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Geographic Discrimination: Of Place, Space, Hillbillies, and Home

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GEOGRAPHIC DISCRIMINATION: OF PLACE, SPACE, HILLBILLIES, AND HOME

William Rhee & Stephen C. Scott***

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ABSTRACT

This Essay explores the two-sided challenge of geographic discrimination, where U.S. citizens receive disparate treatment from other citizens or the government solely because of where they live or self-identify as home, through the interdisciplinary concepts of space, place, and distance; and an original examination of discrimination against Appalachians. Such disparate treatment is unavoidable and even arguably politically correct. Where we call home matters in a number of legitimate ways to include our access to jobs and services, culture, educational opportunities, and other basic human capabilities. Although technology has increased individual mobility more than ever before, a majority of Americans nevertheless live in the same state where they were born.

But even the most invidious geographic discrimination—locational prejudice—remains largely legal under U.S. law. As exemplified by sports rivalries and Appalachian stereotypes, Americans continue to make the stereotyping sampling error, sweeping categorical assumptions about people from a particular place that they probably would not make about race or gender. The “hillbilly” epithet long hurled at Appalachians is one of the oldest examples of locational prejudice in U.S. history. Although Appalachians are often stereotyped as a marginalized poor White minority, in reality, if all the counties defined by federal statute as Appalachia became one state, that state would be the third largest state in the nation with about 17% nonwhite citizens.

Appalachians, like other regional identities, possess considerable definitional problems. Most locational prejudice against Appalachians has probably occurred in places outside Appalachia. Generations of Appalachians have been forced to move to find jobs in the so-called Great Migration of the late 19th and 20th centuries. These self-declared urban Appalachians still consider Appalachia their home. Despite the U.S. District Court encompassing Cincinnati, Ohio, rejecting treating Appalachians as a protected class under the Civil Rights Act of 1964, the City of Cincinnati passed a Human Rights Ordinance in 1992 that remains the only known U.S. law to proscribe Appalachian discrimination. What distinguishes Appalachian discrimination from other U.S. geographic discrimination, however, is the remarkable official recognition that Appalachia has historically suffered locational prejudice by the federal government and by the nine states within Appalachia.

Such invidious locational prejudice—as distinguished from the unavoidable consequences of personal choice and regional planning—requires a remedy. How should U.S. law treat citizens who embody multiple, intersecting protected classes like race, gender, and sexual orientation? Geography has long provided a practical and principled panacea to the longstanding intersectionality (or multidimensionality) problem. Focusing on home and practical geography may not only allow policy makers to reconcile competing individual identities

and protected classes but also help eliminate pretextual discrimination while encouraging concrete compromise.

U.S. law already distinguishes its equal protection jurisprudence geographically with its hierarchy of national, state, county, and municipal law. Basic human capabilities like having a place to live, a job to provide for your family, and a school to teach your children to contribute to U.S. society all require geographic place and space. Ultimately, freedom from discrimination means freedom to come home to where you are equally valued and possess equal opportunity.

I. INTRODUCTION

Why is geographic discrimination against people solely based on where they call home legal? How do we choose between competing identity claims such as race, gender, and sexual orientation? Is there a more systematic way to identify pretextual policies that seem non-discriminatory on their face but actually perpetuate undesirable discriminatory effects?

This Essay uses geographic concepts of place, space, and distance to (1) proscribe locational prejudice, intentional discrimination against U.S. citizens solely because of where they live or self-identify as home; (2) address the difficult dilemma of reconciling competing legal identity claims as exemplified by intersectional (or multidimensional) discrimination;¹ and (3) make pretextual discrimination² policies easier to identify. All legal systems of course employ

¹ The U.S. Equal Employment Opportunity Commission (“EEOC”) has defined “intersectional discrimination” as

when someone is discriminated against because of the combination of two or more protected bases (e.g., national origin and race). “Some characteristics, such as race, color, and national origin, often fuse inextricably . . . Title VII [of the Civil Rights Act of 1964] prohibits employment discrimination based on any of the named characteristics, whether individually or in combination.” Because intersectional discrimination targets a specific subgroup of individuals, Title VII prohibits, for example, discrimination against Asian women even if the employer has not also discriminated against Asian men or non-Asian women.

U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-915.005, ENFORCEMENT GUIDANCE ON NATIONAL ORIGIN DISCRIMINATION 9 (2016) (citations omitted) (quoting *Jeffers v. Thompson*, 264 F. Supp. 2d 314, 326 (D. Md. 2003)), <https://www.eeoc.gov/laws/guidance/upload/national-origin-guidance.pdf>). See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

² *Webster’s Dictionary* defines “pretext” as a “purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs.” *Pretext*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/pretext> (last visited Oct. 31, 2018). Pretextual discrimination is where seemingly legitimate, nondiscriminatory reasons for an action are shown in actuality to provide pretextual cover for illegal intentional discrimination. See *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981).

geographic boundaries and concepts in their legal doctrine.³ We begin to test these geographic concepts through an original examination of Appalachian discrimination.

First, geographic discrimination, where U.S. citizens receive disparate treatment from other citizens or the government solely because of where they live or self-identify as home,⁴ remains two sided. On the one hand, where we call home matters in a number of legitimate ways to include our access to jobs and services, culture, educational opportunities, and other basic human capabilities.⁵ Although technology has increased individual mobility,⁶ most Americans nevertheless live within the same state where they were born.⁷

On the other hand, even the most invidious geographic discrimination—locational prejudice—remains largely legal under U.S. law. As exemplified by sports rivalries and Appalachian stereotypes, Americans continue to make the stereotyping sampling error,⁸ sweeping categorical assumptions about people from a particular place that they probably would not make about race or gender. The “hillbilly” epithet long hurled at Appalachians is one of the oldest examples of locational prejudice in U.S. history. Although Appalachians are often stereotyped as a marginalized poor White minority,⁹ if Appalachia, as currently defined by federal statute,¹⁰ was considered one state, Appalachia would be the third largest state in the nation by population.¹¹ In reality, Appalachia

³ See Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261 (1987); see also Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219 (2010).

⁴ “Geographic discrimination” remains the broader concept that encompasses both benign and intentional discrimination on the basis of locale. “Locational prejudice” is the intentional subset of geographic discrimination.

⁵ For further discussion of human capabilities, see *infra* Part II.

⁶ See JOHANNA ZMUD ET AL., RAND CORP. INST. FOR MOBILITY RESEARCH, *THE FUTURE OF MOBILITY: SCENARIOS FOR THE UNITED STATES IN 2030*, 20–21 (2013), https://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR246/RAND_RR246.pdf.

⁷ See PING REN, U.S. CENSUS BUREAU, *LIFETIME MOBILITY IN THE UNITED STATES: 2010 AMERICAN COMMUNITY SURVEY BRIEFS 1* (2011), <https://www2.census.gov/library/publications/2011/acs/acsbr10-07.pdf> (“Most people in the United States live in the state in which they were born.”). See generally *Migration/Geographic Mobility*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population/migration/about.html> (last visited Oct. 28, 2018) (collecting studies).

⁸ For further discussion of the stereotyping sampling error, see *infra* Section III.

⁹ See Nicholas F. Stump & Anne Marie Lofaso, *De-Essentializing Appalachia: Transformative Socio-Legal Change Requires Unmasking Regional Myths*, 120 W. VA. L. REV. 823, 825–29 (2018).

¹⁰ See 40 U.S.C. §§ 14101–14102 (2018).

¹¹ Aaron Ferrari & Will Rhee, *Unified in Dignified Appalachian Pride*, 120 W. VA. L. REV. 849, 887 (2018).

encompasses tremendous racial, ethnic, and cultural diversity within its small towns and expanding urban areas.¹²

Second, the geographic boundaries of the applicable legal authority's physical jurisdiction and the materially factual ambit of the parties' everyday lives already provide familiar legal limits. Upon these well-established legal geographic constraints, we superimpose a three-part analysis to evaluate geographic discrimination claims:

1. the social construct of *place* (although "home" remains the most important place, "place" includes others like where one works),¹³
2. the physical reality of *space* (e.g., the actual physical location of one's current abode, job, and favorite recreational facilities),¹⁴ and
3. the mixed social-physical concept of *distance* (i.e., the location of something in relation to something else that measures access or exposure).¹⁵ Distance can be literal or figurative.¹⁶ For example, one's daily commute to and from work and home is literal distance. An employee's perception of the gap between her current employment and her desired promotion is a more figurative form of distance. Whether physical or social, distance must always be objectively quantifiable.

By using these well-established interdisciplinary terms,¹⁷ this Essay seeks to mine the rich critical geography literature for legal purposes. For example, the Statue of Liberty's space may be Liberty Island, New York, NY 10004,¹⁸ at 40.68920 Latitude and -74.04450 Longitude,¹⁹ but its place as "The Statue of Liberty Enlightening the World" has been much broader and iconic

¹² See Stump & Lofaso, *supra* note 9, at 829–35; see also *infra* Section III.A.1.

¹³ See John R. Logan, *Making a Place for Space: Spatial Thinking in Social Science*, 38 ANN. REV. SOC. 507, 508 (2012) (defining place).

¹⁴ *Id.* (defining space).

¹⁵ *Id.* at 511–16 (defining distance).

¹⁶ For further discussion, see *infra* Section V.B.

¹⁷ These concepts are familiar to critical housing studies and cultural geography scholars. See generally ALISON BLUNT & ROBYN DOWLING, *HOME* (2006).

¹⁸ *Directions: One National Park, Two Islands in New York Harbor*, NAT'L PARK SERV., <https://www.nps.gov/stli/planyourvisit/directions.htm> (last visited Oct. 31, 2018).

¹⁹ Statue of Liberty National Monument, Directions, GOOGLE MAPS, <https://www.google.com/maps/place/40%C2%B041'22.4%22N+74%C2%B002'40.2%22W/@40.689571,-74.0466737,17z/data=!3m1!4b1!4m6!3m5!1s0x0:0x0!7e2!8m2!3d40.689567!4d-74.0444851> (last visited Oct. 31, 2018).

since its 1886 dedication as a gift from the people of France to the United States.²⁰

This place has been anthropomorphized for legal or policy purposes into symbolizing the entire United States or Democracy itself.²¹ Lady Liberty's place was what inspired doomed pro-democracy Chinese demonstrators in May 1989 to erect a 33-foot Styrofoam-and-plaster replica of the Statue in Beijing's Tiananmen Square.²² Communist Army tanks later flattened the Statue during the Tiananmen Massacre.²³ After the September 11, 2001, World Trade Center terrorist attacks, U.S. country music star Toby Keith penned a battle song²⁴ entitled *Courtesy of the Red, White and Blue (The Angry American)* with the words "And the Statue of Liberty started shaking her fist" in the chorus,²⁵ reflecting the outrage of an entire nation.

Within the geographic context, a legal authority can scrutinize specific facts and evidence to determine whether (and how) the defendant's alleged discrimination in various identity categories, including location, has impaired the alleged victims' human capabilities. The unavoidable reality is that much of daily life is composed of regular habit and routines.²⁶ People have self-reported that "about 43% of [their] actions were performed almost daily and usually in the same context."²⁷

²⁰ *Liberty Enlightening the World*, NAT'L PARK SERV., <https://www.nps.gov/stli/index.htm> (last visited Oct. 31, 2018). For a discussion of how the United States' popular perception of the Statue of Liberty as a place has shifted along with popular perceptions of immigration, see *The Immigrant's Statue*, NAT'L PARK SERV., <https://www.nps.gov/stli/learn/historyculture/the-immigrants-statue.htm> (last visited Oct. 31, 2018).

²¹ Sam Connery, *Taking Liberties with an American Goddess*, SMITHSONIAN MAG. (July 1996), <https://www.smithsonianmag.com/history/taking-liberties-with-an-american-goddess-117253250/>.

²² *Id.*

²³ *Id.*

²⁴ Gayle Thompson, *Story Behind the Song: Toby Keith, 'Courtesy of the Red, White and Blue (The Angry American)'*, THE BOOT (Apr. 21, 2017), <http://theboot.com/toby-keith-courtesy-of-the-red-white-and-blue-the-angry-american-lyrics/> (last visited Oct. 31, 2018) (explaining that the song was intended as a battle song against terrorists).

²⁵ TOBY KEITH, *Courtesy of the Red, White and Blue (The Angry American)*, on UNLEASHED (DreamWorks Records 2002). For the lyrics to this song, see *Courtesy of the Red, White and Blue (The Angry American)*, GENIUS.COM, <https://genius.com/Toby-keith-courtesy-of-the-red-white-and-blue-the-angry-american-lyrics> (last visited Oct. 31, 2018).

²⁶ Wendy Wood & Dennis Runger, *Psychology of Habit*, 67 ANN. REV. PSYCHOL. 289, 290, 306 (2016) (citing WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY (1890)), available at <https://www.annualreviews.org/doi/abs/10.1146/annurev-psych-122414-033417>.

²⁷ *Id.* at 294 (citing Adwait Khare & J. Jeffrey Inman, *Habitual Behavior in American Eating Patterns: The Role of Meal Occasions*, 32 J. CONSUMER RES. 567 (2006); Wendy Wood et al., *Habits in Everyday Life: Thought, Emotion, and Action*, 83 J. PERSONALITY & SOC. PSYCHOL. 1281 (2002)).

Finally, because pretextual discrimination often relies upon geography,²⁸ place, space, and distance provide useful tools with which to smoke out discrimination from seemingly neutral policies and to encourage concrete compromise. Ultimately, freedom from discrimination means freedom to come home to a place where you know you are equally valued and possess equal access to opportunity.

II. BASIC HUMAN CAPABILITIES AT HOME

Focusing on individual people's practical, daily physical access to specific places and spaces begs two further questions. Access *to* what? Access *for* what? Consequently, this Essay's geographic focus pairs well with the Human Capabilities Approach popularized by Martha Nussbaum,²⁹ Amartya Sen,³⁰ and their Human Development and Capability Association.³¹ Nussbaum has defined the Capabilities Approach as asking, "when comparing societies and assessing them for their basic decency or justice, . . . , 'What is each person able to do and to be?'"³² This approach values every individual person's choices and freedom.³³

A. *The Capabilities Approach*

The Capabilities Approach is an aggregate concept—it cannot be reduced to a checklist of specific rights or privileges. Capabilities are the "most important elements of people's quality of life."³⁴ They "are plural and qualitatively distinct: health, bodily integrity, education, and other aspects of individual lives cannot be reduced to a single metric without distortion."³⁵

²⁸ For further discussion, see *infra* Section V.C.

²⁹ See, e.g., MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011) (ebook).

³⁰ See, e.g., AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

³¹ See *About*, HUM. DEV. & CAPABILITY ASS'N, <https://hd-ca.org/about> (last visited Oct. 28, 2018); see also AN INTRODUCTION TO THE HUMAN DEVELOPMENT AND CAPABILITY APPROACH: FREEDOM AND AGENCY ii (S  verine Deneulin & Lila Shahani, eds., 2009), <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/40248/IDL-40248.pdf>, [hereinafter HUMAN DEVELOPMENT AND CAPABILITY APPROACH], (listing Amartya Sen as the HDCA's Founding President and Martha C. Nussbaum as its successive President).

³² NUSSBAUM, *supra* note 29, at 18.

³³ See *id.*

³⁴ *Id.*

³⁵ *Id.*

Human capabilities are “the totality of opportunities” a person “has for choice and action in her specific political, social, and economic situation.”³⁶

This Capabilities Approach utilizes three central concepts: (1) functioning, (2) capability, and (3) agency. A “functioning” is “being or doing what people value and have reason to value.”³⁷ A “capability” is “a person’s freedom to enjoy various functionings—to be or do things that contribute to their well-being.”³⁸ Finally, “agency” is “a person’s ability to pursue and realize goals she values and has reason to value.”³⁹

For example, “being healthy and well-nourished” is a functioning.⁴⁰ Having affordable, sufficient access to nutritious food, adequate health care, and adequate exercise is necessary for a person to have the capability to enjoy this functioning. Lastly, a person must possess sufficient time, knowledge, and resources for the agency to choose whether to exercise such capability. The choice ultimately is hers alone.⁴¹

While capabilities by their very nature vary from person to person and context to context,⁴² there are more important “central capabilities” so fundamental “that their removal makes a life not worthy of human dignity.”⁴³ Even though central capabilities are more fundamental, they alone are not sufficient. To live a dignified life, a person still must have access to other capabilities above and beyond central capabilities. Although Nussbaum has created her own list of 10 central capabilities,⁴⁴ the point here is not to quibble about the specifics of any list—because the same central capability can be expressed in multiple, overlapping ways⁴⁵—but rather to emphasize the need in

³⁶ *Id.* at 21.

³⁷ HUMAN DEVELOPMENT AND CAPABILITY APPROACH, *supra* note 31, at 22.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 31.

⁴¹ NUSSBAUM, *supra* note 29, at 18.

⁴² *Id.* at 18–19.

⁴³ *Id.* at 31.

⁴⁴ Nussbaum’s ten central capabilities are (1) life (“[b]eing able to live to the end of a human life of normal length”); (2) bodily health; (3) bodily integrity; (4) senses, imagination, and thought (being able to use these human characteristics “in a way . . . informed and cultivated by an adequate education”); (5) emotions (“[b]eing able to have attachments to things and people”); (6) practical reason (“[b]eing able to form a conception of the good and to engage in critical reflection about the planning of one’s life”); (7) affiliation (including “freedom of assembly and political speech,” and “nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin”); (8) other species (“[b]eing able to live with concern for and in relation to animals, plants, and the world of nature”); (9) play; and (10) control over one’s environment. *Id.* at 33–34.

⁴⁵ For example, Nussbaum’s dignitary central capabilities explanation echoes much U.S. Supreme Court fundamental rights jurisprudence. *See generally* Maxine Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006).

any democracy for a legal determination of more fundamental central capabilities to allow law to prioritize competing capabilities.⁴⁶ What U.S. law calls fundamental rights are more broadly understood to be central capabilities.⁴⁷

B. Central Capabilities Need Place and Space

Out of the many possible central capabilities, Equal Protection and statutory rights against housing,⁴⁸ employment,⁴⁹ and educational discrimination have been explicitly recognized by the U.S. Fifth and Fourteenth Amendments and various civil rights laws.⁵⁰ We focus on these three capabilities because they parallel the three Appalachian discrimination areas discussed below.⁵¹ As Virginia Woolf observed in *A Room of One's Own*,⁵² we all need literal and figurative space to live, work, and flourish.⁵³

⁴⁶ Different legal sovereigns might disagree over specific central capabilities. For example, unlike international human rights law, U.S. civil rights law has largely avoided making economic rights a civil right. See RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 43–50 (2007) (ebook).

⁴⁷ The reason why this Essay employs “central capabilities” instead of “fundamental rights” is because there are central capabilities, such as the right to be free from geographic discrimination, not considered fundamental rights under U.S. law.

⁴⁸ The primary federal statutes proscribing housing discrimination are the Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619, 3631 (2018), and Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-b (2018). See generally JAMES A. KUSHNER, *GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW & LITIGATION* § 13:5 (“Housing”), § 13:6 (“Public accommodations”) (2017).

⁴⁹ The primary federal statute proscribing employment discrimination is Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e17 (2018). See generally KUSHNER, *supra* note 48, at § 13:4 (“Employment”).

⁵⁰ There are a number of federal statutes and prolific federal case law (including the celebrated *Brown v. Board of Education* decision, 347 U.S. 483 (1954), *supplemented*, 349 U.S. 294 (1955)) proscribing educational discrimination. See generally KUSHNER, *supra* note 48, at § 13:7 (“Education”), § 15 (“Desegregation”) (collecting references).

⁵¹ For further discussion, see *infra* Section IV.D.

⁵² VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* (1929). As Woolf observed, “[A] woman must have money and a room of her own if she is to write fiction.” *Id.* at 4. Woolf imagines that William Shakespeare’s imaginary, but equally gifted, sister Judith Shakespeare would have failed and committed suicide during Shakespeare’s time. *Id.* at 80.

⁵³ See *id.* at 3–4, 21, 79.

1. A Home of One's Own

Home evokes both space and place.⁵⁴ As space, home is simply our current domicile,⁵⁵ where our physical base of operations is presently located. As place, however, as the saying goes, there indeed is no place like home.⁵⁶

As both space and place, home is salient to identity discrimination. Home as space cabins broad discriminatory theories into a more pragmatic, manageable, and limited geographic context. An unattractive physical home can even be called “homely.”⁵⁷ This manageable and limited context remains because home provides a daily geographic anchor for the alleged victim’s everyday life.⁵⁸ While as a place, home “is a piece of the whole environment that has been claimed by feelings.”⁵⁹ Simply put, home is one’s personal sanctuary “within which one acts out and forges an identity.”⁶⁰ Because “multiple social processes intersect in and constitute home,” through home “multiple identities—of gender, race, class, age, and sexuality—are reproduced and contested.”⁶¹

⁵⁴ As Fox observes,

Whatever else it might be, home is a place. This may be a spa[ce] . . . or a place in the memory or imagination, or a place in all of these senses plus more besides—such as an environment that is endowed with spiritual or symbolic significance. A ‘home place’ is also actively fashioned by those who inhabit it or are believed to, including human subjects and vitalizing forces (for example, ancestral or legendary presences).

MICHAEL ALLEN FOX, *HOME: A VERY SHORT INTRODUCTION* 15 (2016).

⁵⁵ *Bailey v. Bailey*, 40 A.2d 581, 581 (1945) (“The place of one’s domicile is the place of his home.”); see also 39 AM. JUR. PROOF OF FACTS, *Establishment of Person’s Domicile* § 2 (2d ed. 1984 & Supp. 2018). Under the Fourteenth Amendment, a U.S. court can exercise personal jurisdiction over a corporation that is considered “at home” in the forum state. See *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014).

⁵⁶ The words “no place like home” have been attributed to many popular works. The earliest known work might be the song “Home, Sweet Home” in John Howard Payne’s 1823 opera *Clari, or the Maid of Milan*. Henry Bishop, *Home, Sweet Home*, in JOHN HOWARD PAYNE, *CLARI, OR THE MAID OF MILAN* (1823).

⁵⁷ The English usage of “homely” as plain or unattractive apparently dates back to the 14th Century. See *Homely*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/homely> (last visited Oct. 28, 2018).

⁵⁸ Although “[h]ome is sometimes a state of mind,” EDMUNDS BUNKŠE, *GEOGRAPHY AND THE ART OF LIFE* 94 (2004), this Essay limits “home” to “a series of feelings and attachments, some of which, some of the time, and in some places, become connected to a physical structure that provides shelter.” BLUNT & DOWLING, *supra* note 17, at 10.

⁵⁹ ALAN GUSSOW, *A SENSE OF PLACE: THE ARTIST AND THE AMERICAN LAND* 27 (1997).

⁶⁰ FOX, *supra* note 54, at 3. Accord James Yandell, Foreword, in CLARE COOPER MARCUS, *HOUSE AS A MIRROR OF SELF: EXPLORING THE DEEPER MEANING OF HOME* xiv, xv (1995).

⁶¹ BLUNT & DOWLING, *supra* note 17, at 27.

German philosopher Otto Bollnow recognized that because we spatially situate our home in relation to our relationship to the group, where we call home is a reference point from which we define our outlook on the world.⁶² A place called home simultaneously functions as the center of “one’s existence” while “overflow[ing] into, and [being] reflexively defined by, larger geopolitical and natural spheres.”⁶³ As a result, politics inescapably surround or even permeate our home from our inevitable social interactions within and outside our home.⁶⁴ Not only have culture and technology blurred the lines between public and private, home and work, but also our view of home is unavoidably shaped by our own unique normative lens.⁶⁵

Another German philosopher, Martin Heidegger, believes that we inhabit the world by dwelling in a home where we feel settled and at peace.⁶⁶ There is a reason why the next question asked among new acquaintances after the obligatory exchange of names is often “where are you from?” or “where’s home for you?”⁶⁷

In other words, everybody needs a place called home where they can develop and refine their own self-identity. Maya Angelou noted that the “ache for home lives in all of us, the safe place where we can go as we are and not be questioned.”⁶⁸ Roman philosopher Pliny the Elder is credited with first saying that home is “where the heart is.”⁶⁹ Although different cultures and different languages might use different words, they do appear to share a “pool of common properties” about home.⁷⁰

But often, like family, our home is our home for better or for worse. If our childhood was filled with rejection or abuse, our childhood home can be a place of great pain. We can be subjected to “house arrest” within our own home. Immigrants and children of immigrants can find themselves caught between competing visions of home.⁷¹ Literal and figurative refugees, migrants, slaves, former slaves, and other marginalized people can be homeless or forced to call a

⁶² FOX, *supra* note 54, at 18 (quoting Otto F. Bollnow, *Lived-Space*, PHIL. TODAY 32–33 (Dominic Gerlach trans. 1961)).

⁶³ *Id.* at 20.

⁶⁴ *Id.* at 78.

⁶⁵ *Id.* at 80–83.

⁶⁶ *Id.* at 21 (citing Martin Heidegger, *Building Dwelling Thinking*, in BASIC WRITINGS (David Farrell Krell ed., 1993)).

⁶⁷ See Julie Beck, *The Psychology of Home: Why Where You Live Means So Much*, ATLANTIC (Dec. 30, 2011), <https://www.theatlantic.com/health/archive/2011/12/the-psychology-of-home-why-where-you-live-means-so-much/249800/>.

⁶⁸ MAYA ANGELOU, ALL GOD’S CHILDREN NEED TRAVELLING SHOES 196 (1991).

⁶⁹ FOX, *supra* note 54, at 2.

⁷⁰ *Id.* at 10.

⁷¹ See generally GABRIEL SHEFFER, DIASPORA POLITICS: AT HOME ABROAD (2003) (ebook).

less than desirable place home.⁷² There also are the actual “homeless” who daily must struggle to secure food, shelter, and other life necessities that those with comfortable homes take for granted.⁷³ In its most sinister manifestation, the human need for home can be weaponized into a terror weapon. “Domicide” is the homicide of your home.⁷⁴

As Janet Zandy wrote, “finding a place in the world where one can be *at home* is crucial.” Home can be “literal: a place where you struggle together to survive;” a “dream: ‘a real home,’ something just out of one’s grasp;” or a “nightmare: a place to escape in order to survive as an individual.”⁷⁵

But we can change our home over time. Although we do not get to choose our birth or childhood home, we can choose to move our home elsewhere as adults. Anthropologist Mary Douglas recognized that “home is not only a space, it also has some structure in time.”⁷⁶

As Appalachian author bell hooks wrote,

Each year of my life as I went home to visit, it was a rite of passage to reassure myself that I still belonged, that I had not become so changed that I could not come home again. My visits home almost always left me torn: I wanted to stay but I needed to leave, to be endlessly running away from home.⁷⁷

Some spend their adult lives seeking an alternative to their childhood home only to find their way back to their youth home, perhaps really seeing it for the first time. Others believe that once you leave, you never really can return home.

A parochial, narrow home viewpoint might blind us from other perspectives, truth, or even self-enlightenment. For some, a broader perspective requires leaving home. Paradoxically, the very comfort and security of our home might delude us to favor unfairly neighbors from home and to discriminate unjustly against visitors from away. Some find home away from their original home: “Then home is no longer just one place. It is locations. Home is that place

⁷² See generally *id.*

⁷³ See J. WOLCH & M. DEAR, *MALIGN NEGLECT: HOMELESSNESS IN AN AMERICAN CITY* 246 (1993).

⁷⁴ J. DOUGLAS PORTEOUS & SANDRA E. SMITH, *DOMICIDE: THE GLOBAL DESTRUCTION OF HOME* 12 (2001).

⁷⁵ JANET ZANDY, *CALLING HOME: WORKING CLASS WOMEN’S WRITINGS 1* (1990) (emphasis in original).

⁷⁶ FOX, *supra* note 54, at 32 (quoting Mary Douglas, *The Idea of Home: A Kind of Space*, 58 SOC. RES. 287 (1991), reprinted in ARIEN MACK, *HOME: A PLACE IN THE WORLD* 263 (1993)).

⁷⁷ BELL HOOKS, *BELONGING: A CULTURE OF PLACE* 17 (2009).

which enables and promotes varied and everchanging perspectives, a place where one discovers new ways of seeing reality, frontiers of difference.”⁷⁸

Human culture and mythology continue to glorify the Ancient Greek *nostos*,⁷⁹ the hero’s epic fight to return home.⁸⁰ *Nostos* has not only given us nostalgia, the painful longing for an absent home, but also *nostimo*, the Greek word for delicious or handsome. Greek language and culture therefore derives their conceptions of what tastes good and what looks good from their understanding of homecoming.⁸¹ While away from home, we can even be homesick.

Considering the importance of home,⁸² it is unsurprising that both U.S.⁸³ and international law⁸⁴ prohibit housing discrimination. One of the biggest reasons to be away from home is to go to work to make a living.

2. A Job of One’s Own

In modern capitalist economies, the ability to earn money through employment is an unavoidable necessity for an adequate life.⁸⁵ Not surprisingly, every possible list of fundamental rights or central capabilities⁸⁶ includes some

⁷⁸ BELL HOOKS, *YEARNING: RACE, GENDER, AND CULTURAL POLITICS* 148 (1991).

⁷⁹ *Nostos* is an ancient Greek word for an epic tale where a hero fights to return home. See Anna Bonifazi, *Inquiring into Nostos and Its Cognates*, 130 AM. J. PHILOLOGY 481, 486 (2009).

⁸⁰ See *id.*; see also ELISABETH BRONFEN, *HOME IN HOLLYWOOD: THE IMAGINARY GEOGRAPHY OF CINEMA* (2004) (examining the notion of home in selected movies).

⁸¹ Henriette Lazaridis, *Home Is Where the Etymology Is*, HUFFINGTON POST (Oct. 28, 2013 5:52 PM, updated Dec. 28, 2013) https://www.huffingtonpost.com/henriette-lazaridis-power/home-is-where-the-etymolo_b_4170132.html.

⁸² See generally FOX, *supra* note 54.

⁸³ See Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (2018); Fair Housing Act, 42 U.S.C. §§ 3601–3631 (2018).

⁸⁴ See International Convention on the Elimination of All Forms of Racial Discrimination, arts. 2 & 3, Dec. 21, 1965, 660 U.N.T.S. 195. See generally Michael B. de Leeuw et al., *The Current State of Residential Segregation and Housing Discrimination: The United States’ Obligations Under the International Convention on the Elimination of all Forms of Racial Discrimination*, 13 MICH. J. RACE & L. 337 (2008).

⁸⁵ “Labor” is one of the four classical economic factors of production. PAUL R. KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY* 160 (4th ed. 1997). The Bible recognized work as one of humanity’s first responsibilities. “The Lord God took the man and put him in the garden of Eden to work it and keep it.” *Genesis* 2:15 (English Standard). In the Bible, the Apostle Paul also commanded able-bodied people to work to earn their livelihood. “[I]f anyone is not willing to work, let him not eat.” 2 *Thessalonians* 3:10 (English Standard).

⁸⁶ See, e.g., Charter of Fundamental Rights of the Eur. Union, art. 15; International Covenant on Civil and Political Rights, art. 6, 11 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights, art. 3, 6–11, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3; Universal Declaration of Human Rights, art. 23, 25, Dec. 10, 1948, G.A. Res. 217A(11), U.N.

form of Nussbaum's formulation, "the right to seek employment on an equal basis with others" and "being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers."⁸⁷

3. A School of One's Own

Although the U.S. Supreme Court has held that the right to education is not a fundamental right under the federal U.S. Constitution,⁸⁸ state constitutions⁸⁹ and international law⁹⁰ recognize education as a central capability. Nussbaum identified "an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training" as a central capability.⁹¹

All central capabilities—including housing, employment, and education—require space and place to function. Locational prejudice, however, may discriminate based on one's space and place. Therefore, these three rights can be indirectly sabotaged by locational prejudice.

III. POLITICALLY INCORRECT LOCATIONAL PREJUDICE

Locational prejudice might be the last politically correct form of discrimination in the United States. Political correctness notwithstanding, locational prejudice is a particularly pernicious form of geographic discrimination where a person receives negative treatment solely because of animus over where she lives or self-identifies as home.

Locational prejudice is pernicious because it fails to rely upon any legitimate empirical inferences. Like racism and sexism, to justify its irrational animus locational prejudice cherry picks a few anecdotal examples or stereotypes

GAOR, 3d Sess., at 71, U.N. Doc. A. *See also* Constitution of the International Labour Organization (ILO), Preamble, 49 Stat. 2712, 15 U.N.T.S. 35, (June 28, 1919), https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:N O; ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference (ILC), 86th Sess., 37 I.L.M. 1233, 1998 WL 778019 (June 18, 1998).

⁸⁷ NUSSBAUM, *supra* note 29, at 34.

⁸⁸ *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). *But see* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (stating "the importance of education to our democratic society").

⁸⁹ *See* Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WM. & MARY L. REV. 215, 224–42 (2017) (collecting state constitutional provisions).

⁹⁰ G.A. Res. 2200 (XXI) art. 13(1), International Covenant on Economic, Social, and Cultural Rights (Jan. 3, 1976); G.A. Res. 2106 (XX) arts. 3(e), 4, International Convention on the Elimination of All Forms of Racial Discrimination in Education (Dec. 21, 1965); G.A. Res. 1386 (XIV) principle 7, Declaration of the Rights of the Child (Nov. 20, 1959); G.A. Res. 217A (III) art. 26 (1), Universal Declaration of Human Rights (Dec. 10, 1948).

⁹¹ NUSSBAUM, *supra* note 29, at 34.

that fail to provide an accurate sample of the population of people from a particular place. Our only point here is to highlight that racism, sexism, other historical forms of discrimination, and locational prejudice all rely on stereotyping. We otherwise do not intend any false equivalencies or hierarchies.

In statistical terms, locational prejudice lacks reliability⁹² and validity.⁹³ Its sweeping categorical inferences about *all* people from a particular place are simply not supported by its flawed, limited sampling (the “stereotyping sampling error”).⁹⁴ This stereotyping sampling error is literally the dictionary definition of discrimination.⁹⁵

Although this criticism should be obvious,⁹⁶ the undeniable fact remains that people who would never similarly essentialize⁹⁷ race or gender categories continue to prejudge and stereotype people from a particular place.⁹⁸ Why do public figures who should know better continue to express locational prejudice?⁹⁹ Why avoid the stereotyping sampling error¹⁰⁰ with race and gender but not with location? One possible explanation is that while U.S. law proscribes racial and gender prejudices, locational prejudices remain legal.¹⁰¹ Regardless of legality, however, locational prejudice is simply shoddy analysis.

What makes locational prejudice even more intractable is its inherent intersection with multiple identity categories. While sports rivalries demonstrate locational prejudice’s apparent political correctness, the regional planning process harnesses useful factual data from respected sources like the U.S. Census Bureau; continuously improving geographic information systems (GIS) mapping technology; and a proactive, detailed geographic framework. Finally, the

⁹² Statistical reliability is “the extent to which it is possible to replicate a measurement, reproducing the same value (regardless of whether it is the right one) on the same standard for the same subject at the same time.” Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 83 (2002).

⁹³ Statistical validity is “the extent to which a reliable measure reflects the underlying concept being measured.” *Id.* at 87.

⁹⁴ See Ferrari & Rhee, *supra* note 11, at 850–51 (utilizing the stereotyping sampling error).

⁹⁵ For example, *Webster’s Dictionary* defines “discrimination” as “the act, practice, or an instance of discriminating categorically rather than individually.” *Discrimination*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/discrimination> (last visited Oct. 28, 2018).

⁹⁶ For further discussion, see *infra* notes 212–213 and accompanying text.

⁹⁷ Essentialism assumes that one or a few members of a group represent the entire group. Will Rhee, *Entitled to Be Heard: Improving Evidence-Based Policy Making Through Audience and Public Reason*, 85 IND. L.J. 1315, 1328 & n.71 (2010) (citing Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990)).

⁹⁸ For further discussion, see *infra* notes 263–266 and accompanying text.

⁹⁹ *Id.*

¹⁰⁰ See Ferrari & Rhee, *supra* note 11 and accompanying text.

¹⁰¹ For further discussion, see *infra* Section III.B.

regional planning process can help distinguish locational prejudice from less avoidable forms of geographic discrimination and provide the beginnings of a potential legal remedy.

A. *An Intersectional or Multidimensional Concept*

As complex and free human beings, we all pride ourselves on our unique individuality.¹⁰² Each human being possesses many dimensions. These dimensions can be embodied physical human traits such as our race, gender, height, and weight¹⁰³ or more expressive human traits such as our religious beliefs (or lack thereof), our fan support of particular sports teams, and our membership in a political party.¹⁰⁴ Law, society, or popular culture identifies some of these human traits like race or gender as materially relevant¹⁰⁵ and ignores others like our height or fan affiliation with a particular sports team as irrelevant.¹⁰⁶

The individual human traits that a person might choose as most important to her self-identity are not necessarily the same human traits emphasized by law. Traditionally, law lacks the flexibility and agility to accommodate individualized conceptions of intersectional identity.

In particular, multiracial Americans demonstrate this definitional disparity between individual self-concept and crude legal categories.¹⁰⁷ Multiracial Americans are the fastest growing demographic group in the nation.¹⁰⁸ From 2014–2060, Americans who self-identify with two or more races are projected according to U.S. Census data to increase by 225.5%.¹⁰⁹ Multiracial people can experience discrimination from people who identify with one or more of their races and from people of other races.¹¹⁰

¹⁰² See, e.g., Linda Nicholson, *Identity After Identity Politics*, 33 WASH. U. J.L. & POL'Y 43, 62 (2010).

¹⁰³ See Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 373 (2006) [hereinafter Mutua, *Future Directions*].

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See generally Phillip Lee, *Identity Property: Protecting the New IP in a Race-Relevant World*, 117 W. VA. L. REV. 1183 (2015).

¹⁰⁸ Howard Hogan et al., *Projecting Diversity: The Methods, Results, Assumptions and Limitations of the U.S. Census Bureau's Population Projections*, 117 W. VA. L. REV. 1047, 1052 (2015).

¹⁰⁹ *Id.* at 1051 tbl.1.

¹¹⁰ See K.P. Brackett et al., *The Effects of Multiracial Identification on Students' Perception of Racism*, 43 SOC. SCI. J. 437, 439 (2006).

The multiracial professional golfer Tiger Woods—whose father was African American, Chinese, and Native American and mother was Thai, Chinese, and Dutch—self-identified as “Cablinasian”—a combination of Caucasian, Black, Indian, and Asian¹¹¹—but when prompted on official forms, Woods selected the “African American” and “Asian” boxes because “those are the two [he] was raised under and the only two [he] know[s].”¹¹² In an interview with Oprah Winfrey, Woods opined, “I’m just who I am . . . whoever you see in front of you.”¹¹³

Before 2000, Woods and other multiracial Americans were forced to choose only one 1997 Office of Management and Budget (OMB) “White,” “Black or African American,” or “Asian” racial and ethnic category when responding to the U.S. Census.¹¹⁴ Since 2000, Woods and other multiracial Americans have had the opportunity to choose all of the OMB racial and ethnic categories they want on the U.S. Census.¹¹⁵ The U.S. Census admits that these racial categories are based on “self-identification” and a “social definition of race recognized in this country.”¹¹⁶

The 2000 change in the U.S. Census racial and ethnic categories was the culmination of the “Multiracial Movement,” a social change movement of multiracial Americans and their families who objected to having to pick and choose only one racial or ethnic category on the Census.¹¹⁷ This successful movement demonstrates that race is a flexible social construct. Multiracial Americans resisted choosing only one racial category on the Census because such a practice erased their true identities.

While race and other human identities are social constructs, they also reflect lived experience, particularly for people with identities against which law has discriminated.¹¹⁸ With certain human traits like race, gender, and sexual orientation, the law has historically discriminated against human beings who possessed stigmatized traits (e.g., Black people, women, gay) and favored human

¹¹¹ Gary Younge, *Tiger Woods: Black, White, Other*, THE GUARDIAN (May 28, 2010, 7:04 PM), <https://www.theguardian.com/sport/2010/may/29/tiger-woods-racial-politics>.

¹¹² *Id.* (quoting the *Oprah Winfrey Show*).

¹¹³ *Id.*

¹¹⁴ *Race*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population/race/about.html> (last visited Nov. 29, 2018).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Aurora Chang-Ross, *Racial Queer: Multiracial College Students at the Intersection of Identity, Education, and Agency*, at 34 (May 2010) (unpublished Ph.D. dissertation, University of Texas at Austin) (on file with University of Texas Libraries).

¹¹⁸ See generally MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (1994).

beings who possessed privileged traits (*e.g.*, White people, men, straight).¹¹⁹ For example, U.S. law has implemented racist, sexist, and homophobic systems to allocate or restrict both material and status-related resources solely based upon people's race, gender, or sexual orientation.¹²⁰

Intersectionality (which originally referred to the nexus of race and gender¹²¹ and later broadened into multidimensionality¹²²) not only demonstrates the many complex ways society can disadvantage or privilege people based on their individual identity but also recognizes that multiple systems of privilege or oppression can conflict with and reinforce each other. Where two or more benefiting or burdening systems intersect, unique multidimensional categories and experiences result.¹²³ For example, a wealthy White heterosexual male may benefit from laws and social norms more than a wealthy White homosexual male, a poor White heterosexual female, or a poor Black homosexual female.¹²⁴

Like the three (or four) spatial dimensions,¹²⁵ geography is also by definition intersectional (or multidimensional). Every individual human being uniquely occupies distinctive physical space and idiosyncratically measures place and distance. Law also underestimates how practical geography implicitly or explicitly constrains the other people—at work, at school, or while doing life—with whom we interact daily and unfortunately from whom we can experience prejudice.

Yet, geography is also forced to aggregate people into larger spaces and places like city blocks, neighborhoods, towns, counties, states, regions, countries, alliances, conferences, and continents.¹²⁶ Because they include greater numbers of diverse human beings within their growing boundaries, these larger geographic units of analysis encompass more multidimensional intersections between different identity categories.¹²⁷ For example, although one

¹¹⁹ See Mutua, *Future Directions*, *supra* note 103, at 373.

¹²⁰ *Id.*

¹²¹ See Athena D. Mutua, *Multidimensionality Is to Masculinities What Intersectionality Is to Feminism*, 13 NEV. L.J. 341, 344 (2013) [hereinafter Mutua, *Multidimensionality*] (citing Crenshaw, *supra* note 1, 1242–43 n.3).

¹²² *Id.* at 346.

¹²³ *Id.*

¹²⁴ For an overview of the legal and social implications of the intersection of these categories, see Mutua, *Multidimensionality*, *supra* note 121.

¹²⁵ The four dimensions are length, width, depth, and time. See *Fourth Dimension*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/fourth%20dimension> (last visited Nov. 1, 2018).

¹²⁶ Geographical scale is “not a preordained hierarchical nomenclature for ordering the world” but is “made by and through social processes.” Sallie A. Marston, *A Long Way from Home: Domesticating the Social Production of Scale*, in *SCALE AND GEOGRAPHIC INQUIRY: NATURE, SOCIETY AND METHOD* 172 (E. Shepherd & R. McMaster eds., 2004).

¹²⁷ See *id.*

neighborhood composed of a few city blocks might be predominantly minority and poor, the entire metropolitan area—to include the more expensive, predominantly White suburbs—presents a more integrated racial and socioeconomic picture.

B. Sports Rivalries

Like geography, sports rivalries are also intersectional (or multidimensional). For better or worse, many Americans are more passionate and knowledgeable about sports than any law or policy.¹²⁸ As *Newsweek* reporter Mark Starr commented, “In this fragmented age, it often seems that only sports can bind the nation—across its divides of class, race and gender—in common cause and celebration.”¹²⁹

In 2007, a *New York Times* story headline ironically proclaimed, “After 88 Years of Rivalry, the Last as Us and Them.”¹³⁰ Two rival Uniontown, New Jersey, high schools, with student attendance zones that divided Uniontown north and south with the town’s “own Mason-Dixon line,” were consolidating into one high school in the fall—ending a bitter Thanksgiving Day rivalry game that had been fought annually between the two high schools for the past 88 years.¹³¹ Rooting for your home team to beat the visiting team is a “complicated, double-edged process of inclusion and exclusion.”¹³²

On the one hand, cheering for the home team can create and maintain a place’s collective identity.¹³³ Your home team’s success encourages your home’s connectedness and provides public pride and pleasure to individual team members and fans and to your entire team.¹³⁴ Shared pride over the home team’s ascendancy promotes cooperation, teamwork, and community.¹³⁵

¹²⁸ See ROOTING FOR THE HOME TEAM: SPORT, COMMUNITY, AND IDENTITY 2 (Daniel A. Nathan ed., 2013).

¹²⁹ Mark Starr, *Blood, Sweat and Cheers*, NEWSWEEK (Oct. 24, 1999, 8:00 PM), <https://www.newsweek.com/blood-sweat-and-cheers-168044>.

¹³⁰ Winnie Hu, *After 88 Years of Rivalry, the Last as Us and Them*, N.Y. TIMES (Nov. 22, 2007), <https://www.nytimes.com/2007/11/22/nyregion/22union.html>.

¹³¹ *Id.*

¹³² ROOTING FOR THE HOME TEAM, *supra* note 128, at 2.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 3.

Every sports team not only represents a place¹³⁶ but also anthropomorphically personifies that place with its name and mascot.¹³⁷ The place literally becomes the team name and persona. In Appalachia, the U.S. National Football League (“NFL”) American Football Conference (“AFC”) Pittsburgh Steelers¹³⁸ remain nostalgically named after steel workers (“Steelers”)¹³⁹ even though steel mills have not operated within Pittsburgh’s city limits since the late 1980s.¹⁴⁰

On the other hand, sports rivalries have literally or figuratively excluded other people. The history of U.S. sports of course reflects the same racism, sexism, and prejudice prevalent in the nation at large.¹⁴¹ In the annual zero-sum competition, for the home team to win, the visiting team must lose. There can only be one champion.

Furthermore, booing or hating the away team involves a negative animus reminiscent of racism, sexism, and other forms of bigotry. In sports, the most extreme form of socially acceptable bigotry might be the annual rivalry game.¹⁴² Both authors are personally familiar with one college football rivalry, the “Backyard Brawl” between two Appalachian college football teams, the West Virginia University (“WVU”) Mountaineers and the University of Pittsburgh (“Pitt”) Panthers. When interviewed about the “Backyard Brawl” in 2007, former Pitt football center J.C. Pelusi observed: “[Y]ou really didn’t care about winning the game. All you cared about was really hurting the people on the other side of

¹³⁶ See generally *U.S. State Sports Teams*, 50STATES.COM, <https://www.50states.com/sports/> (last visited Oct. 28, 2018).

¹³⁷ See generally *Mascots: A Closer Look*, INT’L U. SPORTS FED’N, <https://www.fisu.net/about-fisu/fisu-brand/mascots/mascots-winter> (last visited Oct. 28, 2018) (explaining the French origin of the word “mascot” as “mascotte,” meaning lucky charm and stating that the first 19th century mascots were real live animals).

¹³⁸ See *Pittsburgh Steelers, Team History*, PRO FOOTBALL HALL OF FAME, <http://www.profootballhof.com/teams/pittsburgh-steelers/team-history/> (last visited Oct. 28, 2018).

¹³⁹ See *Steeler*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/steeler> (“one that steels; especially: a smith who steels edged tools”) (last visited Oct. 28, 2018).

¹⁴⁰ Bill Toland, *In Desperate 1983, There Was Nowhere for Pittsburgh’s Economy to Go but Up*, PITT. POST-GAZETTE (Dec. 23, 2012, 5:00 AM), <http://www.post-gazette.com/business/businessnews/2012/12/23/In-desperate-1983-there-was-nowhere-for-Pittsburgh-s-economy-to-go-but-up/stories/201212230258>.

¹⁴¹ See ROOTING FOR THE HOME TEAM, *supra* note 128, at 3.

¹⁴² For discussion of a high school rivalry game, see *supra* notes 130–131 and accompanying text.

the football field. They didn't like us a whole lot and we didn't like them a whole lot and there wasn't a whole lot of respect."¹⁴³

In the rivalry, WVU's hatred of Pitt remains equally pronounced. When asked in 2014 during an ESPN *College Gameday* appearance in Morgantown, West Virginia (the home of the WVU football team), who he would pick to win a Pitt versus Duke game, country music star Brad Paisley, a West Virginian, initially responded, "We have a little chant about those [Pitt] guys, you wanna hear it?" The home WVU crowd then started chanting, "Eat \$#!+ Pitt!" Later, Paisley picked Duke to win. He admitted his pick was "mostly because I hate them."¹⁴⁴

Such extreme locational prejudice can also exacerbate preexisting tensions between neighbors. Sports rivalry even catalyzed actual physical conflict in the 1969 "Soccer War" between El Salvador and Honduras.¹⁴⁵ Three qualifying matches for the 1970 Mexico City World Cup demonstrated that "[s]occer, metaphor for war, at times turns into real war."¹⁴⁶ The Soccer War raged for six days.¹⁴⁷ Both nations suffered over 2,000 casualties.¹⁴⁸ After the war, more than 100,000 Salvadorans fled Honduras, severely injuring the Honduran economy.¹⁴⁹ Fortunately, sports rivalry appears to have little influence (outside the normal entertainment and tourism context) on the professional regional planning essential to maintain the United States' high standard of living.¹⁵⁰

¹⁴³ JOHN ANTONIK, *THE BACKYARD BRAWL: STORIES FROM ONE OF THE WEIRDEST, WILDEST, LONGEST RUNNING, AND MOST INTENSE RIVALRIES IN COLLEGE FOOTBALL HISTORY* 144 (2012).

¹⁴⁴ WVUNite, *What I Think About Texas Catholic University and ESPN College Gameday*, THE SMOKING MUSKET (Oct. 2, 2017, 7:30 AM ET), <https://www.smokingmusket.com/2017/10/2/16395696/what-i-think-about-west-virginia-mountaineers-cspn-college-gameday-wvu-football-tcu-horned-frogs>; see also ANTONIK, *supra* note 143, at 3 (discussing WVU's chant); Cam Huffman, *Brad Paisley's Mountaineer Roots Run Deep*, REGISTER-HERALD (Oct. 30, 2014), http://www.register-herald.com/sports/college_sports/brad-paisley-s-mountaineer-roots-run-deep/article_b66dd1f4-1e14-5f8b-aa88-674ef4b5d8f4.html (discussing Brad Paisley's birthplace).

¹⁴⁵ Yuriy Veytskin et al., *The Soccer War*, SOCCER POL., <https://sites.duke.edu/wcwp/research-projects/the-soccer-war/> (last visited Oct. 28, 2018).

¹⁴⁶ EDUARDO GALEANO, *SOCCER IN SUN AND SHADOW* 129 (1998).

¹⁴⁷ See Yuriy Veytskin et al., *supra* note 145.

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ See, e.g., *OECD Better Life Index: United States*, ORG. FOR ECON. CO-OPERATION AND DEV., <http://www.oecdbetterlifeindex.org/countries/united-states/> (last visited Oct. 28, 2018).

C. Regional Planning

Creating and maintaining the considerable public, cultural, residential, and commercial infrastructure and features throughout the United States requires tremendous planning and coordination. We briefly overview the most common types of regional planning. While one may remain blissfully unaware of it, this interconnected web of complex planning unavoidably channels and limits our daily life choices and routines. Moreover, the data generated by such planning can provide a rich and more objective context for discrimination disputes and feasible remedies.

Most U.S. land-use planning and zoning decisions involve up to four local bodies to whom states have delegated their zoning authority under the police power:¹⁵¹ the local legislature (for example, board of aldermen or city council); the zoning commission; the planning commission; and the board of adjustment (or zoning board of appeals).¹⁵² A U.S. Department of Commerce model code, the Standard State Zoning Enabling Act, has been adopted by most states as state law and mandates these four bodies.¹⁵³

Whether local land-use decisions are made through a fair and orderly process or *ad hoc*, subjective, individual deal-making remains disputed.¹⁵⁴ Notwithstanding such dispute, local governments have an incentive to create and follow comprehensive land-use plans before exercising their police power to zone because the plans' policies, goals, and objectives provide persuasive evidence of the rational basis of their land-use decisions.¹⁵⁵

A comprehensive land-use plan is

an official public document preferably (but often not) adopted as law by the local government as a policy guide to decisions about the physical development of the community. Usually it sets forth, in a general way, using text and maps, how the leaders of local government want the community to develop in the future. The length of the future time period to be addressed by a

¹⁵¹ See U.S. CONST. amend. X.

¹⁵² Sara C. Bronin & Dwight H. Merriam, *Nature and Operation of Zoning Ordinances—Implementation and Administration*, in 1 THE LAW OF ZONING AND PLANNING § 1:3 (Arden H. Rathkopf et al. eds., 4th ed. 2018).

¹⁵³ *Id.*; see also U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (1926); Stuart Meck, *Model Planning and Zoning Legislation: A Short History*, in 1 MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS (1996), https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/PAS462.pdf.

¹⁵⁴ See, e.g., Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 300 (2013) (stating that “land use control typically proceeds in a piecemeal fashion”).

¹⁵⁵ See JULIAN CONRAD JUERGENSMEYER ET AL., LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 27 (4th ed. 2018).

comprehensive plan varies widely from locale to locale, and is often set by state legislation enabling or requiring local governments to plan.¹⁵⁶

The American Planning Association has recognized four principal characteristics of a rational, comprehensive planning process. It is (1) future-oriented; (2) continuous; (3) based upon a determination of present and projected conditions within the plan's area; and (4) fair.¹⁵⁷

Although an in-depth examination is beyond the scope of this Essay, we highlight aspects of this comprehensive planning process because it provides critical evidence and context with which to evaluate alleged geographic discrimination. Particularly salient to this Essay are (1) public works planning; (2) residential planning; (3) cultural planning; and (4) commercial planning for their impact on central capabilities like housing, employment, and education.

1. Public Works Planning

Regional planning in the public sector of course is very different than regional planning in the private sector. Among other differences, public planning is usually defined by capital budgets and typically is not motivated by profit.¹⁵⁸ The American Public Works Association defines public works as the “combination of physical assets, management practices, policies, and personnel necessary for government to provide and sustain structures and services essential to the welfare and acceptable quality of life for its citizens.”¹⁵⁹ Public works include the familiar water, utilities, and trash collection functions.¹⁶⁰

While public works functions are well-established, controversy remains over who provides them.¹⁶¹ Are they provided by traditional local government organizations, private contractors, or some combination?¹⁶²

Because government still by and large controls public works in the United States, political influence is more important to public works planning than other, more private planning. With public works planning, the relevant government agency and planner “find themselves developing the project, justifying the project, begging for funding, tip-toeing through political changes,

¹⁵⁶ *Id.* at 27–28.

¹⁵⁷ *Id.* (citing *APA Policy Guide on Smart Growth*, AM. PLANNING ASS'N (Apr. 15, 2012), <https://www.planning.org/policy/guides/adopted/smartgrowth.htm>).

¹⁵⁸ PSMJ RES. INC., *THE ULTIMATE PUBLIC WORKS PROJECT MANAGEMENT MANUAL 25* (2015).

¹⁵⁹ *What Is Public Works*, AM. PUB. WORKS ASS'N, http://www3.apwa.net/discover/what_is_public_works (last visited Oct. 28, 2018).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

[and] dealing with not-in-my-backyard (NIMBY) coalitions.”¹⁶³ Because electricity, water, recycling, and trash are available throughout the nation, such public utilities require integrated national networks to meet both local and national needs. Consequently, public works require complex planning and coordination to function.¹⁶⁴ Functioning public utilities are also essential for residential homes to flourish.

2. Residential Planning

Designing and building homes in close proximity to public highways, roads, services (like schools and hospitals), shopping, and jobs requires remarkable planning and coordination.¹⁶⁵ When laying out a new residential area, a planner must consider at least eight major issues: (1) commercial viability; (2) the design’s place and space; (3) the design’s environmental impact; (4) pedestrian and vehicular access and movement; (5) integration of other use structures like “shops and services, pubs and restaurants, . . . religious and other community buildings,” and “spaces for business use”;¹⁶⁶ (6) safety and ease of finding your way around; (7) contemporary residential townscape features; and (8) social life in outdoor spaces.¹⁶⁷ Much social life outside the home involves cultural recreation.

3. Cultural Planning

Cultural planning has been defined as “a community-wide process of creating a vision for cultural programming and development.”¹⁶⁸ A cultural facility is

¹⁶³ PSMJ RES. INC., *supra* note 158.

¹⁶⁴ For example, there is considerable planning and coordination just to determine public works right-of-way. *See, e.g.*, PAUL DEVANEY, AM. PUB. WORKS ASS’N, UPROW, RIGHTS-OF-WAY MANAGEMENT 6.1 (2001), http://www2.apwa.net/documents/ResourceCenter/Rights-of-Way_Mgt.pdf; *see also* *Utilities & Public Rights-of-Way Committee*, AM. PUB. WORKS ASS’N, https://www.apwa.net/MYAPWA/Groups___Committees/Technical_Committees/Utilities___Public_Rights-of-Way_Committee/MyApwa/Apwa_Public/Tech_Cmtes/UPROW/Utility_and_Public_Right-of-Way_Committee.aspx?hkey=ccaf4028-f95c-4855-80ac-7e7a6017a1b5 (last visited Oct. 28, 2018) (defining UPROW).

¹⁶⁵ MIKE BIDDULPH, INTRODUCTION TO RESIDENTIAL LAYOUT 1 (2007).

¹⁶⁶ *Id.* at 6–7.

¹⁶⁷ *Id.* at 6–9.

¹⁶⁸ *Culture and Communities: Strengthening and Enriching Communities Through the Arts*, AMS. FOR THE ARTS, <https://www.americansforthearts.org/by-topic/culture-and-communities> (last visited Oct. 28, 2018).

a building used primarily for the programming, production, presentation, and/or exhibition of cultural disciplines—such as music, dance, theater, literature, visual arts, and historical and science museums. Cultural facilities like concert halls, art galleries, performing arts center, etc. can be an important anchor for a community, often creating a cultural identity for a place.¹⁶⁹

Cultural facilities can often provide the “launching point for a broader cultural plan.”¹⁷⁰ Because they attract people, cultural facilities often have a symbiotic relationship with commercial facilities.

4. Commercial Planning

Finally, all the other types of planning inevitably affect commercial planning because there is a “close and important interaction” between customers’ willingness to travel and the location of businesses.¹⁷¹ Consumers’ “trip distribution pattern” and businesses’ “location distribution pattern” form the “business land-use system” of a town or city.¹⁷² Although e-commerce, the “buying and selling of products and services exclusively through electronic channels,” continues to increase,¹⁷³ e-commerce currently is less than 10% of all U.S. retail sales.¹⁷⁴ Recently, more employers are limiting employee telecommuting and requiring employees to commute to a physical work location.¹⁷⁵

D. U.S. Federal Geographic Statistics

All forms of regional planning employ free and comprehensive U.S. federal geographic statistics. The decennial U.S. Census is mandated in Article I, Section 2 of the U.S. Constitution.¹⁷⁶ Because the U.S. Census Bureau’s data

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Qian Liu & Chongchao Huang, *Modeling Business Land Use Equilibrium for Small Firms’ Relocation and Consumers’ Trip in a Transportation Network*, 16 NETWORKS & SPATIAL ECON. 497, 497 (2016).

¹⁷² *Id.* at 498.

¹⁷³ *E-Commerce in the United States*, STATISTA, <https://www.statista.com/study/28028/e-commerce-in-the-united-states-statista-dossier/> (last visited Oct. 28, 2018).

¹⁷⁴ *Id.* at 13.

¹⁷⁵ See, e.g., John Simons, *IBM, a Pioneer of Remote Work, Calls Workers Back to the Office*, WALL ST. J. (May 18, 2017, 8:00 AM), <https://www.wsj.com/articles/ibm-a-pioneer-of-remote-work-calls-workers-back-to-the-office-1495108802>.

¹⁷⁶ U.S. CONST. art. I, § 2 (“The actual Enumeration shall be made . . . within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”).

about the United States' people and economy determines so many essential government functions,¹⁷⁷ U.S. Census data should be authoritative and reliable.¹⁷⁸

Not the U.S. Census Bureau, but rather the U.S. Office of Management and Budget (OMB) in the Executive Office of the President of the United States determines the geographically defined core based statistical areas (CBSAs) federal agencies use to collect federal statistics.¹⁷⁹ A CBSA contains a core area with a substantial population nucleus and adjacent communities that possess "a high degree of economic and social integration with that core."¹⁸⁰

CBSAs further break down into two smaller areas, metropolitan and micropolitan. Metropolitan areas contain 50,000+ people. Micropolitan areas contain greater than 10,000 but less than 50,000 people.¹⁸¹ Counties or their equivalent are the "geographic 'building blocks'" for micropolitan and metropolitan statistical areas.¹⁸² The largest city within each statistical area is designated a "principal city."¹⁸³

Metropolitan and micropolitan boundaries do not necessarily reflect urban-rural divides.¹⁸⁴ In fact, these statistical areas are solely for statistical purposes and are not intended to reflect nonstatistical purposes.¹⁸⁵ Metro and

¹⁷⁷ Among other purposes, U.S. Census data is used to "determine the distribution of Congressional seats to states," "make planning decisions about community services," and "distribute more than \$675 billion in federal funds to local, state and tribal governments each year." *About the Bureau: What We Do*, U.S. CENSUS BUREAU, <https://www.census.gov/about/what.html> (last visited Oct. 28, 2018).

¹⁷⁸ See *EEOC v. E.I. du Pont de Nemours & Co.*, No. Civ.A. 03-1605, 2004 WL 2347559, at *1 (E.D. La. Oct. 18, 2004) (denying a motion to exclude a printout of U.S. Census website data); Robert Groves, *The Credibility of Government Statistics; Trust in Their Source*, U.S. CENSUS BUREAU: DIRECTOR'S BLOG (Apr. 25, 2011), <https://www.census.gov/newsroom/blogs/director/2011/04/the-credibility-of-government-statistics-trust-in-their-source.html>. But see David S. Evans & Richard Schmalensee, *How We Learned (Almost) Everything That's Wrong with U.S. Census Data*, HARV. BUS. REV. (Mar. 11, 2016), <https://hbr.org/2016/03/how-we-learned-almost-everything-thats-wrong-with-u-s-census-data>.

¹⁷⁹ See *Metropolitan and Micropolitan: About*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/metro-micro/about.html> (last visited Oct. 28, 2018).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

micro areas can cross state lines. For example, Russell County, Alabama, is part of the Columbus, Georgia, metro area.¹⁸⁶

There are of course other readily available sources of U.S. national and geographic data. Perhaps most familiar to average citizens are the telephone area codes of the North American Numbering Plan¹⁸⁷ and the U.S. Postal Service Zoning Improvement Plan (ZIP) code.¹⁸⁸ Both concisely pinpoint specific geographic areas of the United States.

E. *Geographic Information Systems (GIS)*

Such geographic statistics can be processed into geographic information using computer-based geographic information services (GIS). As the saying goes, a picture is worth a thousand words.¹⁸⁹ There are many different open-source GIS computer applications available.¹⁹⁰ Popular versions of GIS include

¹⁸⁶ See *Metropolitan and Micropolitan Areas*, ALA. ST. DATA CTR., https://cber.cba.ua.edu/asdc/metro_micro.html (last visited Oct. 28, 2018).

¹⁸⁷ Every U.S. state is assigned one or more area codes based on its population. There is a number of searchable online compilations of ever increasing area codes. See, e.g., *Understanding Area Codes: Area Code Lookup*, VERIZON, <https://www.verizon.com/support/residential/homephone/area-international-info/area-code-lookup> (last visited Oct. 28, 2018) (searchable database by area code or state). For a concise popular history of the U.S. telecommunications North American Numbering Plan, see Megan Garber, *Our Numbered Days: The Evolution of the Area Code*, ATLANTIC (Feb. 13, 2014), <https://www.theatlantic.com/technology/archive/2014/02/our-numbered-days-the-evolution-of-the-area-code/283803/>.

¹⁸⁸ In a five-digit ZIP code, the first digit designated a broad geographical area of the United States, ranging from zero for the Northeast to nine for the far West. This number was followed by two digits that more closely pinpointed population concentrations and those sectional centers accessible to common transportation networks. The final two digits designated small Post Offices or postal zones in larger zoned cities. See U.S. POSTAL SERV., *THE UNITED STATES POSTAL SERVICE: AN AMERICAN HISTORY 1775–2006*, 33 (2012), <https://about.usps.com/publications/pub100.pdf>.

¹⁸⁹ See, e.g., *A picture is worth a thousand words*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/a%20picture%20is%20worth%20a%20thousand%20words> (last visited Sept. 24, 2018) (identifying the expression as an English idiom).

¹⁹⁰ Bin Li, *Information Services, Geography*, in *ENCYCLOPEDIA OF GIS* 577, 578–79 (Shashi Shekhar & Hui Xiong eds., 2008), https://link.springer.com/content/pdf/10.1007%2F978-0-387-35973-1_637.pdf.

free virtual three-dimensional mapping applications¹⁹¹ like Google Earth¹⁹² and the National Aeronautics and Space Administration's (NASA's) WorldWind.¹⁹³

Geographic information is “knowledge acquired through processing geographically referenced data. [GIS] are (1) functionality provided by a software entity through its interfaces defined as named sets of operations and, (2) provisions of information generated from geospatial data.”¹⁹⁴ GIS provide “a rich set of spatial analysis tools for managing spatial data, identifying spatial relationships, measuring spatial concepts, and making spatial predictions.”¹⁹⁵

Although GIS maps provide useful summary demonstrative aids that increase general understanding of data, most relevant here is GIS mapping “as a tool for discovery and analysis throughout the investigation” and “not merely a decoration for the resulting manuscript.”¹⁹⁶ The analysis of GIS maps capitalizes upon the reality that “social processes operating in space produce patterns.”¹⁹⁷ Most social and legal processes have a predetermined spatial structure because “objects and events that are geographically proximate are often related, whether through causation or correlation.”¹⁹⁸

In light of such versatility, GIS have already been used to analyze alleged systemic discrimination in education,¹⁹⁹ housing,²⁰⁰ and voting.²⁰¹ These unique features make GIS ideally suited to analyze geographic discrimination as well.

¹⁹¹ Michael Goodchild, *Foreword* to *ENCYCLOPEDIA OF GIS* ix (Shashi Shekhar & Hui Xiong eds., 2008), <https://link.springer.com/content/pdf/bfm%3A978-0-387-35973-1%2F1.pdf>.

¹⁹² See generally *GOOGLE EARTH*, <https://www.google.com/earth/> (last visited Oct. 29, 2018).

¹⁹³ See generally *NASA WORLDWIND*, <https://worldwind.arc.nasa.gov/> (last visited Oct. 29, 2018).

¹⁹⁴ Li, *supra* note 190, at 578.

¹⁹⁵ Wendy K. Tam Cho & James G. Gimpel, *Geographic Information Systems and the Spatial Dimensions of American Politics*, 15 *ANN. REV. POL. SCI.* 443, 444 (2012), <https://www.annualreviews.org/doi/pdf/10.1146/annurev-polisci-031710-112215>.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See Deenesh Sohoni & Salvatore Saporito, *Mapping School Segregation: Using GIS to Explore Racial Segregation between Schools and Their Corresponding Attendance Areas*, 115 *AM. J. EDUC.* 569 (2009).

²⁰⁰ See *NAT'L RESEARCH COUNCIL, GIS FOR HOUSING AND URBAN DEVELOPMENT* 17 (National Academies Press 2003), <https://www.nap.edu/catalog/10674/gis-for-housing-and-urban-development>.

²⁰¹ See M. Horn, *GIS and the Geography of Politics*, in *NEW DEVELOPMENTS IN GEOGRAPHICAL INFORMATION SYSTEMS: PRINCIPLES, TECHNIQUES, MANAGEMENT AND APPLICATIONS* 939 (P.A. Longley et al. eds., abr. 2d ed. 2005).

IV. COLOR IT APPALACHIAN

After losing a wager on the 2010 Olympic Men's Ice Hockey Championship Game between the United States and Canada, U.S. President Barack Obama—who is of Black Kenyan and White Kansan ethnicity²⁰²—famously gave Canadian Prime Minister Stephen Harper—who is of White Scottish and White English ethnicity²⁰³—a case of Obama's favorite brew, the Appalachian beer Yuengling.²⁰⁴

According to popular U.S. mythology, Appalachia has been long considered a place where poor Whites live.²⁰⁵ In fact, when asked if President Lyndon Johnson's 1960s War on Poverty had a racial color, the War on Poverty's "Chief Midwife" Adam Yarmolinsky responded, "Color it Appalachian if you are going to color it anything at all."²⁰⁶

Appalachia is the geographic space that is defined by the Appalachian Mountains in the eastern United States. In the 1560s, Spanish and French cartographers first named the region "Appalchen" after mistakenly assuming that the region was the Apalachee Native American tribe's residence.²⁰⁷ The region became "Appalachia" in the 1800s, defining the region in social, economic, and cultural ways.²⁰⁸ This geographic place—and a shared history of exploiting

²⁰² See BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* 25 (Crown Publishers 2004) (1995).

²⁰³ See Follers, *Stephen Harper*, ETHNICELEBS.COM (Dec. 17, 2014), <http://ethnicelebs.com/stephen-harper>.

²⁰⁴ Andrew Wagner, *Obama Settles Beer Bet with Yuengling*, NBC 10 (PHILA.), (Mar. 19, 2010), <https://www.nbcphiladelphia.com/news/politics/Obama-Sends-Case-of-Yuengling-to-Canada-88659612.html>. Yuengling's headquarters is in Schuylkill County, Pennsylvania. See Lynda McDaniel, *Appalachian Scene: It's All About People*, APPALACHIA MAG., https://www.arc.gov/magazine/articles.asp?ARTICLE_ID=82 (last visited Oct. 29, 2018).

²⁰⁵ See ELIZABETH CATTE, *WHAT YOU ARE GETTING WRONG ABOUT APPALACHIA* 11–12 (2018).

²⁰⁶ JAMES T. PATTERSON, *AMERICA'S STRUGGLE AGAINST POVERTY IN THE TWENTIETH CENTURY* 130 (2009) (citing Adam Yarmolinsky, in *POVERTY AND URBAN POLICY: CONFERENCE TRANSCRIPT OF 1973 GROUP DISCUSSION OF THE KENNEDY ADMINISTRATION URBAN POVERTY PROGRAMS AND POLICIES* 162–63 (1973)); see also CATTE, *supra* note 205, at 44 (quoting Yarmolinsky) (citation omitted); Bart Barnes, *Adam Yarmolinsky Dies*, WASH. POST (Jan. 7, 2000), https://www.washingtonpost.com/archive/local/2000/01/07/adam-yarmolinsky-dies/c83048df-96e2-4752-b26c-94cff43c4515/?utm_term=.4ec09f9c2054 (quoting Rowland Evans and Robert Novak describing Yarmolinsky as the "chief midwife on the hurried birth of the poverty program").

²⁰⁷ Matthew H. Walker, *Discrimination Based on National Origin and Ancestry: How the Goals of Equality Have Failed to Address the Pervasive Stereotyping of the Appalachian Tradition*, 38 U. DAYTON L. REV. 335, 338 (2013) (citing Chad Berry, *Appalachia: Who Cares, and So What?*, BEREA C.: HUTCHINS LIBR., <http://libraryguides.berea.edu/essayappalachia> (last updated June 2, 2017)).

²⁰⁸ *Id.*

natural resource wealth from that place—continues to define Appalachian identity and distinguish prejudice against Appalachians from that against other U.S. minority groups.²⁰⁹ Accordingly, prejudice against Appalachians remains prejudice against people from a particular geographic place, namely home.

Locational prejudice against Appalachians predates the establishment of the United States and remains not only socially acceptable but also legal.²¹⁰ American citizens and national leaders regularly employ Appalachian stereotypes that would likely be unthinkable for other classifications like race or gender.

Locational prejudice against Appalachians could be legally remedied in one of two ways: (1) a simple change in legal doctrine or (2) legal recognition that Appalachians suffer from past inequality and inequity deserving federal and state protection. Remedying locational prejudice, however, is more complicated than simply adopting new legal protections because of the unavoidable discrimination that accompanies where we live, where we work, and where we belong.

A. *Are Hillbillies Hilarious or Offensive?*

The history of public ridicule towards Appalachians in the United States is older than the United States itself.²¹¹ This public ridicule, unfortunately, has persisted into the twenty-first century. For example, on June 2, 2008, while campaigning for Republican Presidential Nominee John McCain in West Virginia, former Republican Vice President Dick Cheney made an incest joke,

²⁰⁹ Although Appalachia has multiple definitions, this Essay adopts the Appalachian Regional Commission's (ARC) statutory definition of Appalachia as spanning the length of the Appalachian Mountains, including parts of 12 states—Alabama, Georgia, Kentucky, Maryland, Mississippi, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, and Virginia—and all of West Virginia. See 40 U.S.C. §§ 14101–14102 (2018); see also *The Appalachian Region*, ARC, https://www.arc.gov/appalachian_region/TheAppalachianRegion.asp (last visited Sept. 24, 2018). What defines an Appalachian remains a disputed question today. See, e.g., Anne Rachel Terman, *Intersections of Appalachian Identity*, in *APPALACHIA REVISITED: NEW PERSPECTIVES ON PLACE, TRADITION, AND PROGRESS* 73 (William Schumann & Rebecca Adkins Fletcher eds., 2016).

²¹⁰ See *infra* Section IV.D.

²¹¹ See ANTHONY HARKINS, *HILLBILLY: A CULTURAL HISTORY OF AN AMERICAN ICON* 13–46 (2004). Although the origins of the word “hillbilly” are uncertain, the most credible theory is that Scots—either in Scotland or the United States—linked two older Scottish expressions for “fellow” or “companion,” *hill-folk* and *billie*, to form “hillbilly” in the late nineteenth century. *Id.* at 48.

adding, “And we don’t even live in West Virginia. You can say those things when you’re not running for re-election.”²¹² Cheney later apologized.²¹³

More recently, native Appalachian J.D. Vance popularized breathtaking stereotypes in his *New York Times* Bestseller (one of six books “to help understand Trump’s win,”²¹⁴ and a soon-to-be-made major motion picture directed by Ron Howard²¹⁵), *Hillbilly Elegy: A Memoir of Family and Culture in Crisis*.²¹⁶

Vance’s very title communicated his intent to eulogize Appalachia’s death and “crisis” culture. He eulogized the American Dream of Appalachian upward generational mobility, writing, “We’ve learned, painfully, that for the multigenerational poor, home might be the worst enemy. Appalachian loyalty to the land is the stuff of legend, yet the stubbornness of poverty in the region means that those who stay risk being poor forever.”²¹⁷ Vance’s allegedly evidence-based coup de grâce on his native homeland was to conclude coldly yet coherently that “[i]f we cannot improve . . . the mountain hollow—and the evidence suggests we can’t—then the best anti-poverty program is a ticket to somewhere else.”²¹⁸ As native Appalachian and law professor Jedediah Purdy²¹⁹

²¹² *Cheney Apologizes for West Virginia Incest Joke*, FOXNEWS.COM, (Mar. 25, 2015), <http://www.foxnews.com/story/cheney-apologizes-for-west-virginia-incest-joke> [hereinafter *Cheney Apologizes*]; Editorial, *Cheney’s “Joke” Shows How Hurtful Hillbilly Stereotype Is*, HERALD-DISPATCH (June 5, 2008), http://www.herald-dispatch.com/opinion/editorial-cheney-s-joke-shows-how-hurtful-hillbilly-stereotype-is/article_f237b518-5a90-57ac-a38a-404749f69790.html.

²¹³ According to Cheney’s spokeswoman, “[t]he vice president’s offhand comment was not meant to hurt anyone . . . On reflection, he concluded that it was an inappropriate attempt at humor that he should not have made. The vice president apologizes to the people of West Virginia for the inappropriate remark.” *Cheney Apologizes*, *supra* note 212.

²¹⁴ *6 Books to Help Understand Trump’s Win*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/10/books/6-books-to-help-understand-trumps-win.html>.

²¹⁵ David McNary, *Ron Howard to Direct, Produce ‘Hillbilly Elegy’ Movie*, VARIETY (Apr. 10, 2017), <http://variety.com/2017/film/news/ron-howard-hillbilly-elegy-movie-1202027659/>. Ironically, Ron Howard played Opie Taylor on *The Andy Griffith Show*, a television program that peddled popular Appalachian stereotypes. See Angela Cooke-Jackson & Elizabeth K. Hansen, *Appalachian Culture and Reality TV: The Ethical Dilemma of Stereotyping Others*, 23 J. MASS MEDIA ETHICS 183, 184 (2008).

²¹⁶ J.D. VANCE, *HILLBILLY ELEGY: A MEMOIR OF A FAMILY AND CULTURE IN CRISIS* (2016); see also *Hillbilly Elegy: About*, HARPERCOLLINS PUBLISHERS, <https://www.harpercollins.com/9780062300546/hillbilly-elegy> (last visited Oct. 29, 2018).

²¹⁷ J.D. Vance, *Consigned to ‘Assistance,’* NAT’L REV. (Oct. 20, 2014, 8:00 AM), <http://www.nationalreview.com/article/388854/consigned-assistance-j-d-vance>.

²¹⁸ *Id.* As explained below, Vance has created a nonprofit organization with the stated mission to help Ohio and Appalachia. See *infra* note 254 and accompanying text.

²¹⁹ See Marshall Sella, *Against Irony*, N.Y. TIMES MAG. (Sept. 5, 1999), <https://archive.nytimes.com/www.nytimes.com/library/magazine/home/19990905mag-sincere-culture.html> (profiling Purdy and his Appalachian family).

observed upon reading Vance's book, "writing about yourself and the people you love is always an exercise in both loyalty and betrayal."²²⁰

While most of *Hillbilly Elegy* was autobiographical, Vance generalized Appalachians with common characteristics:

- as "truly irrational,"
- as spending their "way into the poorhouse,"
- as having thrift "inimical" to their "being,"
- as having "homes" that are "chaotic mess[es],"
- as having "[a]t least one member of the family us[ing] drugs,"
- as "hit[ting] and punch[ing] each other, all in front of the rest of the family, including young children,"
- as not studying as children and not making "our kids study when we're parents," and
- as "never giving [their children] the tools—like peace and quiet at home—to succeed."²²¹

By so doing, Vance committed the stereotypical sampling error.²²² Although his empirical evidence is largely limited to his personal experience, he nevertheless essentializes *all* Appalachians based on his biased personal sample. As Elizabeth Catte commented in response to an interview of Vance, "It is telling how infrequently individuals who are both Black and Appalachian appear in his remarks. While bemoaning [Appalachians'] basic cognition, he takes liberties with his own by refusing to acknowledge that not all [Appalachians] are white."²²³

²²⁰ See Jedediah Purdy, *Red-State Blues*, NEW REPUBLIC (Sept. 14, 2016), <https://newrepublic.com/article/136328/red-state-blues>.

²²¹ VANCE, *supra* note 216, at 146–47. To be fair to Vance, even though he wrote his insulting sentences with the seemingly universally applicable "we," he later wrote, "Not all of the white working class struggles . . . My grandparents embodied one type: old-fashioned, quietly faithful, self-reliant, hardworking." *Id.* at 147.

²²² See *Cheney Apologizes*, *supra* note 212 and accompanying text.

²²³ CATTE, *supra* note 205, at 37 (quoting Ezra Klein, *A Conversation with J.D. Vance, the Reluctant Interpreter of Trumpism*, VOX (Feb 2, 2017, 11:40 AM), <https://www.vox.com/2017/2/2/14404770/jd-vance-trump-hillbilly-elegy-ezra-klein-show>).

In fact, the widespread, bipartisan acceptance²²⁴ of Vance's empirically suspect conclusions²²⁵ demonstrates the ongoing battle over the public narrative of Appalachia.

1. The Ongoing Battle over Appalachia's Public Story

A number of Appalachian scholars have persuasively documented how for centuries outsiders have silenced native Appalachian voices in oversimplified, disingenuous explanations of what supposedly ails the Appalachian region.²²⁶ As Catte observed, "Using Appalachians to fill made-to-

²²⁴ See *supra* notes 214–215 and accompanying text. As Professor Lisa Pruitt astutely summarized:

There is often what I call a "shock and awe" character to the response [to *Hillbilly Elegy*], a "there are actually people like Vance and his family out there in America" response. Who knew? . . . [T]o illustrate just how over the top the media response to *Hillbilly Elegy* has been, let me quote a few reviews. Bloomberg identified the book as "the most popular choice for best book of 2016." . . . [The] *New York Times* . . . called the book "a compassionate, discerning sociological analysis of the white underclass." . . . The *Economist* . . . opines that "you will not read a more important book this year." In short, the reviewer falls hook, line and sinker for Vance's tough love, personal responsibility prescription, calling it a "bracing tonic."

One reason I am surprised by the glowing reviews (especially among left-leaning outlets) and the "millions sold" is that I would not have expected 21[st century] Americans—particularly among the chattering classes (and I know a shocking number of law professors who have read this book)—to be so interested in a story of white class migration.

Lisa Pruitt, *The "Shock and Awe" Response to Hillbilly Elegy: Pondering the Role of Race*, CONCURRING OPINIONS (May 6, 2017), <https://concurringopinions.com/archives/2017/05/the-shock-and-awe-response-to-hillbilly-elegy-pondering-the-role-of-race.html> (citations omitted in original); see also Sarah Jones, *J.D. Vance: The False Prophet of Blue America*, NEW REPUBLIC (Nov. 17, 2016), <https://newrepublic.com/article/138717/jd-vance-false-prophet-blue-america>.

²²⁵ For example, Appalachian authors who have presented their own personal narratives to counter Vance's story have pointed out that Vance's story could be an outlier and not an accurate representation of the entire diverse Appalachian population. See, e.g., Betsy Rader, *I Was Born in Poverty in Appalachia. 'Hillbilly Elegy' Doesn't Speak for Me.*, WASH. POST (Sept. 1, 2017), https://www.washingtonpost.com/opinions/i-grew-up-in-poverty-in-appalachia-jd-vances-hillbilly-elegy-doesnt-speak-for-me/2017/08/30/734abb38-891d-11e7-961d-2f373b3977ee_story.html?utm_term=.54daf894f2a4; Travis D. Stimeling, *We're Not Singing a Hillbilly Elegy: Challenging Stereotypes in Contemporary Appalachian Song*, OUPBLOG (Aug. 17, 2017), <https://blog.oup.com/2017/08/appalachian-music-stereotypes/>. See also *infra* notes 252–261 and accompanying text.

²²⁶ See generally Stump & Lofaso, *supra* note 9. See, e.g., APPALACHIA IN THE MAKING: THE MOUNTAIN SOUTH IN THE NINETEENTH CENTURY (Mary Beth Pudup et al. eds., 1995); BACK TALK FROM APPALACHIA: CONFRONTING STEREOTYPES (Dwight B. Billings et al. eds., 1999); DWIGHT B. BILLINGS & KATHLEEN M. BLEE, THE ROAD TO POVERTY: THE MAKING OF WEALTH AND HARDSHIP IN APPALACHIA (2000); BLACKS IN APPALACHIA (William H. Turner & Edward J. Cabbell eds., 1985); CATTE, *supra* note 205, pts. I–II; WILMA DUNAWAY, THE FIRST AMERICAN FRONTIER: TRANSITION TO CAPITALISM IN SOUTHERN APPALACHIA, 1700–1860 (1996); RONALD ELLER,

order constituencies, anchored by race, is a tired game.”²²⁷ In particular, there is a “longstanding pattern of presenting Appalachia as a monolithic ‘other America’ that defies narratives of progress.”²²⁸ Perhaps the greatest harm of this misleading monolithic myth is that it renders invisible the considerable diversity that actually exists in Appalachia.²²⁹ Thus, this longstanding myth has enabled the rest of the nation to accept Appalachia as a “‘sacrifice zone’ of cultural and environmental degradation.”²³⁰

Here are select counterexamples to refute three malevolent monolithic narratives that (1) Appalachia only cares about coal jobs; (2) Appalachians are predominantly White Scots-Irish; and (3) Appalachia singlehandedly won the 2016 U.S. Presidential election for Donald Trump.

i. The Coal Industry is no Longer a Significant Appalachian Employer

First, it is a myth that Appalachia “digs” only coal. The coal industry is no longer a significant employer in Appalachia.²³¹ The federal government has

MINERS, MILLHANDS, AND MOUNTAINEERS: INDUSTRIALIZATION OF THE APPALACHIAN SOUTH, 1880–1930 (1982); JOHN GAVENTA, POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY (1980); HARKINS, *supra* note 211; HIGH MOUNTAINS RISING: APPALACHIA IN TIME AND PLACE (Richard A. Straw & H. Tyler Blethen eds., 2004); NADINE HUBBS, REDNECKS, QUEERS, AND COUNTRY MUSIC (2014); T.R.C. HUTTON, BLOODY BREATHITT: POLITICS AND VIOLENCE IN THE APPALACHIAN SOUTH (2013); TOM KIFFMEYER, REFORMERS TO RADICALS: THE APPALACHIAN VOLUNTEERS AND THE WAR ON POVERTY (2008); RONALD L. LEWIS, BLACK COAL MINERS IN AMERICA: RACE, CLASS, AND COMMUNITY CONFLICT, 1780–1980 (1987); RONALD L. LEWIS, TRANSFORMING THE APPALACHIAN COUNTRYSIDE: RAILROADS, DEFORESTATION, AND SOCIAL CHANGE IN WEST VIRGINIA, 1880–1920 (1998); AARON PURCELL, WHITE COLLAR RADICALS: TVA’S KNOXVILLE FIFTEEN, THE NEW DEAL, AND THE MCCARTHY ERA (2009); REBECCA SCOTT, REMOVING MOUNTAINS: EXTRACTING NATURE AND IDENTITY IN THE APPALACHIAN COALFIELDS (2010); HENRY D. SHAPIRO, APPALACHIA ON OUR MIND: THE SOUTHERN MOUNTAINS AND MOUNTAINEERS IN THE AMERICAN CONSCIOUSNESS, 1870–1920 (1978); CRANDALL SHIFFLETT, COAL TOWNS: LIFE, WORK, AND CULTURE IN COMPANY TOWNS OF SOUTHERN APPALACHIA, 1880–1960 (1991); JERRY BRUCE THOMAS, AN APPALACHIAN NEW DEAL: WEST VIRGINIA IN THE GREAT DEPRESSION (1998); JOHN ALEXANDER WILLIAMS, APPALACHIA: A HISTORY (2002); WOMEN OF THE MOUNTAIN SOUTH: IDENTITY, WORK, AND ACTIVISM (Connie Park Rice & Marie Tedesco eds., 2015).

²²⁷ CATTE, *supra* note 205, at 4.

²²⁸ *Id.* at 9.

²²⁹ *Accord id.* at 27; Stump & Lofaso, *supra* note 9, at 833.

²³⁰ JOYCE M. BARRY, STANDING OUR GROUND: WOMEN, ENVIRONMENTAL JUSTICE, AND THE FIGHT TO END MOUNTAINTOP REMOVAL 98 (Marie Tedesco ed., 2012). As Barry explained, “[w]hen populations are viewed as outside mainstream American culture, culturally backward, or too connected to nature, it becomes difficult to garner support from outside the region.” *Id.* at 99.

²³¹ CATTE, *supra* note 205, at 5. For example, in 2017, coal miners were less than 2% of West Virginia’s workforce. Gwynn Guilford, *The 100-Year Capitalist Experiment That Keeps Appalachia Poor, Sick, and Stuck on Coal*, QUARTZ (Dec. 30, 2017), <https://qz.com/1167671/the->

awarded \$94 million in grants to coal-impacted Appalachian communities to encourage them to diversify and grow their local economies beyond coal.²³² In fact, from 2000 to 2010, the top three Appalachian employers were Food, Lodging, and Entertainment; State and Local Government; and Health and Social Services.²³³

ii. *Appalachians Are Not Mostly White Scots-Irish*

Second, the claim that Appalachia remains a pure bastion of Scots-Irish White folk is demonstrably false. In the past, African American coal miners have made up 20-50% of the Appalachian mining workforce.²³⁴ The largest post-Civil War armed uprising in U.S. history took place in 1921 at the Battle of Blair Mountain in West Virginia, where more than 13,000 coal miners and their allies (including about 2,000 African Americans) fought the coal barons' private armies, West Virginia police and militia, and the U.S. military.²³⁵

Although Appalachia remains predominantly White, it is much more diverse than its stereotyped national portrayal. Seventeen and one-half percent of all Appalachians identify as belonging to a racial minority (as compared to the national average of 33.7%).²³⁶ Appalachia's African American and Hispanic growth rate is greater than most of the nation.²³⁷ More people in Appalachia identify as African American than Scots-Irish.²³⁸ Nearly half of southern Appalachia's population growth since 1990 came from Latinos moving to Appalachia.²³⁹ Latino Appalachian entrepreneurs have started successful

100-year-capitalist-experiment-that-keeps-appalachia-poor-sick-and-stuck-on-coal/ (citing West Virginia Office of Miners' Health, Safety and Training Data).

²³² *Partnerships for Opportunity and Workforce and Economic Revitalization (POWER) Initiative*, APPALACHIAN REGIONAL COMM'N, <https://www.arc.gov/funding/power.asp> (last visited Sept. 17, 2018).

²³³ ARC, APPALACHIAN REGION INDUSTRY REPORT – 2014, at 1, <http://www.arc.gov/images/appregion/AppalachianRegionIndustryReport2014.pdf> (last visited Oct. 30, 2018).

²³⁴ CATTE, *supra* note 205, at 23; see WILLIAM C. BLIZZARD, WHEN MINERS MARCH 291 (2010); see also Kenneth R. Bailey, *The Battle of Blair Mountain*, W. VA. ENCYCLOPEDIA, <https://www.wvencyclopedia.org/articles/532> (last visited Dec. 16, 2018).

²³⁵ CATTE, *supra* note 205, at 21.

²³⁶ Stump & Lofaso, *supra* note 9, at 832 (citing Kelvin Pollard & Linda A. Jacobsen, ARC, THE APPALACHIAN REGION: A DATA OVERVIEW FROM THE 2011-2015 AMERICAN COMMUNITY SURVEY (2017), https://www.arc.gov/research/researchreportdetails.asp?REPORT_ID=132).

²³⁷ CATTE, *supra*, note 205, at 9.

²³⁸ *Id.* at 27.

²³⁹ Stump & Lofaso, *supra* note 9, at 833 (citing William Schumann, *Introduction: Place and Place-Making in Appalachia*, in APPALACHIA REVISITED: NEW PERSPECTIVES ON PLACE, TRADITION, AND PROGRESS 8 (William Schumann & Rebecca Adkins Fletcher eds., 2016)).

businesses in places like Dalton, Georgia; Morganton, North Carolina; and Morristown, Tennessee.²⁴⁰

Although Appalachia is known to have more traditional family relationships and values than much of the nation,²⁴¹ West Virginia, the only state entirely in Appalachia,²⁴² nevertheless has the highest concentration of transgendered teenagers in the United States.²⁴³

iii. *Appalachia Did Not Singlehandedly Win the 2016 U.S. Election for President Donald Trump*

Finally, the claim that Appalachia won the 2016 U.S. Presidential election for Trump is also false. Although by percentage of actual votes West Virginia supported Trump more than any other state in the nation, the actual number of votes are a different story. While 2.6 million New Yorkers and 4.6 million Floridians voted for Trump, only 489,371 West Virginians voted for Trump.²⁴⁴ Eight out of the ten best congressional districts for President Donald Trump were in New York City, which, of course, is not located in Appalachia.²⁴⁵

The media coverage of McDowell County, West Virginia, demonstrates this misrepresentation of President Trump's Appalachian support. The *Huffington Post* called its story about McDowell County a "glimpse at the America that voted Trump into office."²⁴⁶ CBS News correspondent Ted Koppel concurred, calling McDowell County "unambiguously[] Trump Country."²⁴⁷

²⁴⁰ Eric Franklin Amarante, *The Unsung Latino Entrepreneurs of Appalachia*, 120 W. VA. L. REV. 773, 775 (2018).

²⁴¹ Kathryn A. Russ, *Working with Clients of Appalachian Culture*, VISTAS ONLINE, Mar. 2010, at 3–4, https://www.counseling.org/resources/library/VISTAS/2010-V-Online/Article_69.pdf (collecting studies); see also U.J. Wood, *Growing Up Queer in Appalachia*, SCALAWAG (Mar. 7, 2017), <https://www.scalawagmagazine.org/2017/03/growing-up-queer-in-appalachia/>.

²⁴² See 40 U.S.C. §§ 14101, 14102 (2018) (listing all West Virginia counties as in Appalachia).

²⁴³ Stump & Lofaso, *supra* note 9, at 833 (citing JODY L. HERMAN ET AL., THE WILLIAMS INST., AGE OF INDIVIDUALS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES 5 (2017), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAgeReport.pdf>).

²⁴⁴ *Id.* at 834–35 (citations omitted).

²⁴⁵ CATIE, *supra* note 205, at 10. New York, however, includes counties considered within the statutory definition of Appalachia. See 40 U.S.C. §§ 14101, 14102.

²⁴⁶ *Id.* at 26 (quoting Sam Levine, *This County Gives a Glimpse at the America That Voted Trump into Office*, HUFFINGTON POST (Nov. 18, 2016, 10:43 AM), https://www.huffingtonpost.com/entry/mcdowell-county-trump_us_582f18dde4b030997bbefa0d).

²⁴⁷ *Id.* (quoting Ted Koppel, *The View of Voters in West Virginia Coal Country*, CBS NEWS (Nov. 13, 2016, 9:18 AM), <https://www.cbsnews.com/news/the-view-of-voters-in-west-virginia-coal-country/>).

When CNN reported that Trump had won 90% of the Republican primary vote in McDowell County, West Virginia, CNN failed to mention that McDowell County's actual primary votes totaled only just over 700.²⁴⁸ Because of historically low voter turnout, Trump won McDowell County in the general election with only 27% of the reported vote.²⁴⁹

Although Appalachia admittedly suffers from many social problems, all of Appalachia's social problems can also be found elsewhere in the United States without the patronizing rancor too often reserved for Appalachia.²⁵⁰

In response to such caricatured outsider narratives, Appalachians recently have become more emboldened to tell their own more nuanced, complex stories.²⁵¹ For example, J.D. Vance exemplifies the intersectionality of geographic identity, as his recent life experience actually contradicts Appalachian stereotypes. Vance was raised in Middletown, Ohio.²⁵² Although at the time of writing *Hillbilly Elegy* he lived in the California Bay Area, Vance has moved back to Columbus, Ohio (the capital of Ohio, one of the states in Appalachia, but actually located outside Appalachia),²⁵³ and established a

²⁴⁸ *Id.* at 14.

²⁴⁹ *Id.* at 26.

²⁵⁰ *See id.* at 2.

²⁵¹ *See* Catherine V. Moore, *Dissatisfied with the National Media's Frame, Appalachia Finds Its Own Voice*, COLUM. JOURNALISM REV. (July 6, 2017), https://www.cjr.org/local_news/appalachia-journalism.php. As Moore summarized:

Even before Donald Trump's election, Appalachia was treated as a kind of Rosetta stone for deciphering rural white poverty in America. In its aftermath, media inquiries . . . confirmed many residents' deep-seated fear that the national press only shows up when the news is bad, or to make them look like fools or freaks. Instead of inviting input on how to frame their stories, reporters seemed to be looking for people to fit a frame they already had in mind.

Id.

²⁵² VANCE, *supra* note 216, at 12. Middletown is located in the Butler and Warren Counties of Ohio. *See Visitors*, CITY OF MIDDLETOWN, OHIO, <https://www.cityofmiddletown.org/148/Visitors> (last visited Oct. 29, 2018) (linking Butler County and Warren County Visitors Bureaus). Although both Counties are outside the statutory definition of Appalachia, see 40 U.S.C. §§ 14101–14102 (2018), this Essay accepts that people from outside these statutorily defined areas can nevertheless self-identify as Appalachian. *See infra* Section IV.C.

²⁵³ Shawn Donnan, *Hillbilly Elegist JD Vance: 'The People Calling the Shots Really Screwed Up'*, FIN. TIMES (Feb. 2, 2018), <https://www.ft.com/content/bd801c3c-fab7-11e7-9b32-d7d59aace167>; *see also* 40 U.S.C. §§ 14101–14102.

nonprofit organization ostensibly to help Ohioans.²⁵⁴ A venture capitalist²⁵⁵ exploring running for political office as a Republican,²⁵⁶ he graduated from Yale Law School²⁵⁷ and married an Indian-American lawyer he met there²⁵⁸ who at the time of writing is clerking for U.S. Supreme Court Chief Justice John Roberts.²⁵⁹ Vance allegedly has been mentored by *Battle Hymn of the Tiger Mother*²⁶⁰ author (and Yale law professor) Amy Chua and entrepreneur Peter Thiel.²⁶¹

2. If Race Were Substituted for Place, the Appalachian Narrative Would Be Very Different

Substitute “African American” for “West Virginian” or “Appalachian” in Cheney²⁶² and Vance’s²⁶³ aforementioned locationally prejudicial generalizations. Are all Black people incestuous? Are all Black people lazy, irrational spendthrifts who are prone to violence and never give their children the tools to succeed with chaotic homes and at least one family member addicted to drugs? Imagine the deserved condemnation both men would have received over such racial remarks. Neither Cheney nor Vance made such disparaging remarks about race because they presumably knew better.²⁶⁴

²⁵⁴ James Hohrman, *The Daily 202: Why the Author of “Hillbilly Elegy” Is Moving Home to Ohio*, WASH. POST (Dec. 21, 2016), https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2016/12/21/daily-202-why-the-author-of-hillbilly-elegy-is-moving-home-to-ohio/5859da6ee9b69b36fcfeaf48/?utm_term=.397bc1875f17.

²⁵⁵ At the time of writing, Vance apparently is the managing partner of the Rise of the Rest Seed Fund, a \$150 million early stage venture capital fund. *J.D. Vance, Managing Partner, Rise of the Rest Seed Fund*, REVOLUTION, <https://www.revolution.com/team-member/j-d-vance/> (last visited Oct. 29, 2018).

²⁵⁶ See *J.D. Vance, Again, Decides Not to Run for Ohio U.S. Senate Seat*, CLEVELAND.COM (Jan. 19, 2018), https://www.cleveland.com/open/index.ssf/2018/01/jd_vance_again_decides_not_to.html.

²⁵⁷ CATTE, *supra* note 205, at 43.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Caroline Kitchner, *How the “Tiger Mom” Convinced the Author of Hillbilly Elegy to Write His Story*, ATLANTIC (June 7, 2017), <http://www.theatlantic.com/business/archive/2017/06/hillbilly-elegy-mentor/529443/>.

²⁶¹ CATTE, *supra* note 205, at 43.

²⁶² See *Cheney Apologizes*, *supra* note 212 and accompanying text.

²⁶³ VANCE, *supra* note 216 and accompanying text.

²⁶⁴ We reiterate that our only point here is to highlight that racism and locational prejudice both rely upon stereotyping. We otherwise do not intend any false equivalencies.

Yet with locational prejudice, why do they and others lack similar restraint? As Professor Jill Fraley has observed, “Apparently, some professionals are not concerned that it is still acceptable to laugh about Appalachia.”²⁶⁵ Why do they make the stereotyping sampling error²⁶⁶ with Appalachians when they would never do so with race?

Moreover, Elizabeth Catte and others have argued that stereotyping White Appalachians actually provides pretextual support for racism against African Americans.²⁶⁷ By perpetuating the essentialized (and inaccurate) myth that all Appalachians are stupid White people,²⁶⁸ Catte argue that Vance is actually providing a White straw man counterexample to rebut charges of racism against “why don’t you people help yourselves?” blaming African American stereotypes:

In *Elegy* and in Vance’s comments about *Elegy*’s subjects, White Appalachians take on the qualities of an oppressed minority much in the same way conservative individuals view African Americans: as people who have suffered hardships but ultimately are only holding themselves back. This construction allows conservative intellectuals to talk around stale stereotypes of African Americans and other nonwhite individuals while holding up the exaggerated degradations of a white group thought to defy evidence of white privilege.²⁶⁹

Whether stereotypical or not, locational prejudice against Appalachians has a well-established history that predates the nation’s founding.

B. Historical Discrimination Against Appalachians

Congress found and codified that the Appalachian “people” are unified by two important aspects of their history.²⁷⁰ (1) their history of harvesting the Appalachian Mountains’ rich natural resources to power growth outside Appalachia and (2) their history of poverty—the fact that the Appalachian people

²⁶⁵ Jill M. Fraley, *Invisible Histories & the Failure of Protected Classes*, 29 HARV. J. ON RACIAL & ETHNIC JUST. 95, 95 (2013).

²⁶⁶ See *supra* note 94 and accompanying text.

²⁶⁷ CATTE, *supra* note 205, at 36–41.

²⁶⁸ Sociologist Wilma Dunaway calls this myth the “ethnic homogeneity thesis.” See Wilma A. Dunaway, *The Legacy of Social Darwinism in Appalachian Scholarship*, SCHOLAR, http://scholar.lib.vt.edu/faculty_archives/appalachian_women/ethnicit.htm (last visited Oct. 27, 2018).

²⁶⁹ CATTE, *supra* note 205, at 36–37.

²⁷⁰ “Congress finds and declares that the Appalachian region of the United States . . . lags behind the rest of the Nation in its economic growth and that its people have not shared properly in the Nation’s prosperity.” 40 U.S.C. § 14101 (2018).

have been improperly excluded from their fair share of the Nation's prosperity.²⁷¹ A U.S. Presidential Commission, whose findings were endorsed by the federal government and nine states,²⁷² called such continuing injustice to the Appalachian people "The Legacy of Neglect."²⁷³ The Commission explained this history of neglect in more detail:

Where a society depends primarily on the extraction of natural resources for its income and employment—as did the people of Appalachia—it is extremely important that a high proportion of wealth created by extraction be reinvested locally in other activities. The relatively low proportion of native capital did not produce such a reinvestment in large sections of the region. Much of the wealth produced by coal and timber was seldom seen locally. It went downstream with the great hardwood logs; it rode out on rails with the coal cars; it was mailed between distant cities as royalty checks from nonresident operators to holding companies who had bought rights to the land for 50 cents or a dollar an acre. Even the wages of local miners returned to faraway stockholders via company houses and company stores.²⁷⁴

The genesis and purpose of harmful Appalachian stereotypes were to maintain the oppression and exploitation of Appalachian people.²⁷⁵ As Fraley observed, law has long understood that stereotypes are tools to effectuate discrimination.²⁷⁶ What people who should know better fail to realize is that

²⁷¹ *Id.*

²⁷² See *infra* note 393 and accompanying text.

²⁷³ ARC, APPALACHIA: A REPORT BY THE PRESIDENT'S APPALACHIAN REGIONAL COMMISSION 19 (1964) [hereinafter *Appalachia Report*], <https://www.arc.gov/noindex/aboutarc/history/parc/PARCRreport.pdf>.

²⁷⁴ *Id.* at 20.

²⁷⁵ See Stump & Lofaso, *supra* note 9, at 847; see also HARKINS, *supra* note 211, at 56–57 (explaining how early 20th century industrialists used locational prejudice in a negative public relations campaign designed to rebut growing popular criticism of their exploitative labor practices). As with other identity slurs and labels (the Lesbian Gay Bisexual Transgender Questioning (LGBTQ) "pink triangle" being perhaps the most well-known), some activists have tried to repurpose the term "hillbilly" to represent the authentic Appalachian people. See, e.g., *id.* at 216–26; see also *Pink Triangle*, SCHOOLS OUT UK, <http://www.schools-out.org.uk/?resources=pink-triangle> (last visited Dec. 16, 2018) (explaining that in Nazi concentration camps "men convicted for sexual deviance, including homosexuality, wore a pink triangle").

²⁷⁶ Fraley, *supra* note 265, at 97–98. As Fraley stated, "relatively little research has focused on the connection between stereotypes and discrimination." *Id.* at 97 n.17 (citing MELINDA JONES, SOCIAL PSYCHOLOGY OF PREJUDICE 10 (2002)). "Scholars disagree as to whether stereotypes cause (or precede) discrimination . . . or emerge as a justification for discrimination (and therefore follow

hillbilly stereotypes share a demeaning, historical ugliness with racial, gender, and sexual orientation slurs.²⁷⁷

Therefore, people who would never intentionally discriminate against race, gender, or sexual orientation might nevertheless intentionally discriminate against location like Appalachia.²⁷⁸ For example, self-identified “liberal middle-class whites” in Cincinnati admitted to a *Los Angeles Times* reporter that although their parents strictly forbade them from using racial epithets, their families freely used the term “hillbilly” at home without comparable censure.²⁷⁹ An urban Appalachian woman, who was a partner at a prominent Cincinnati law firm, also related to the reporter that during a job interview in the 1980s right after she had graduated from law school, a Cincinnati senior partner informed her “that he had to ‘be careful’ about hiring anyone with a mountain accent.”²⁸⁰

C. Boundary Drawing Problems

This Essay argues that all locational prejudice should be legally prohibited.²⁸¹ Like anti-Muslim bigots who attack Sikhs under the mistaken belief that a Sikh turban is a Muslim head covering,²⁸² people and organizations

as evidence of it.” *Id.* With the latter theory, “stereotypes develop to ‘explain and justify’ both prejudice and exploitation.” *Id.* (quoting Monica Biernat & John F. Dovidio, *Stigma and Stereotypes*, in *THE SOCIAL PSYCHOLOGY OF STIGMA* 90 (Todd F. Heatherton ed., 2000)).

²⁷⁷ Cf. Anne Shelby, *The “R” Word: What’s So Funny (and Not So Funny) About Redneck Jokes*, in *BACK TALK FROM APPALACHIA: CONFRONTING STEREOTYPES* 154 (Dwight B. Billings, et al. eds., Univ. Press of Kentucky 1999); Elizabeth Catte, *Liberal Shaming of Appalachia: Inside the Media Elite’s Obsession With the “Hillbilly Problem,”* SALON (Mar. 21, 2017, 11:00 PM), <https://www.salon.com/2017/03/21/liberal-shaming-of-appalachia-inside-the-media-elites-obsession-with-the-hillbilly-problem/>.

²⁷⁸ For example, law professors and expert witnesses should know better. Yet U.S. law professor Jill Fraley, a native Appalachian, in 2013, stated that a fellow law professor had “publicly analyzed [her] facial structure,” presumably for Appalachian-like physical features (whatever that means), and “an expert witness asked if [her] mother was also [her] cousin.” Fraley, *supra* note 265, at 95. A 1972 U.S. congressional report even concluded that “Appalachians do not have the cultural background and skills to live in the cities.” WILLIAM W. PHILLIBER ET AL., *THE INVISIBLE MINORITY: URBAN APPALACHIANS* 117 (Univ. Press of Kentucky ed., 1981) (quoting *Rural Development Act of 1972: Hearing on H.R. 12931 before the H. Comm. On Agric.*, 92d Cong. (1972)) (internal quotation marks omitted).

²⁷⁹ Judy Pasternak, *Bias Blights Life Outside Appalachia: Decades After They Left the Mountains for Cincinnati, Families Endure Prejudice and Social Ills. The City Bans Discrimination Against Them, But Stereotypes Are Hard to Break*, L.A. TIMES (Mar. 29, 1994), http://articles.latimes.com/1994-03-29/news/mn-39810_1_urban-appalachian-council.

²⁸⁰ *Id.*

²⁸¹ For further discussion, see *infra* Section V.A.

²⁸² See, e.g., Moni Basu, *15 Years After 9/11, Sikhs Still Victims of Anti-Muslim Hate Crimes*, CNN (Sept. 16, 2016, 11:22 AM), <https://www.cnn.com/2016/09/15/us/sikh-hate-crime-victims/index.html>.

that exhibit locational prejudice should be held accountable for their animus *period*, regardless of the true identity of their intended victims. If an employer refuses to hire an otherwise qualified applicant under the mistaken belief that the applicant is Appalachian, then that employer should be liable for locational prejudice against Appalachians even if the applicant is actually from Colorado. It is the societal evil of locational prejudice that should be legally proscribed. Discriminators should not otherwise be rewarded for ignorant prejudice.²⁸³

Although locational prejudice presents clear evil, geographic identity is much more difficult to recognize than race. In particular, there remains much controversy over how to define the Appalachian region,²⁸⁴ let alone how to define whether or not someone is truly an Appalachian.²⁸⁵ In an attempt to minimize boundary drawing definitional challenges, we accept the current definition of Appalachia as defined by federal statute.²⁸⁶ In our view, any changes to this geographical definition of Appalachia should be made through statutory amendment for clarity. As far as individual Appalachian status, we attempt to rely more on objectively verifiable factual place and space than self-identification with three categories: (1) native Appalachians; (2) resident Appalachians; and (3) urban Appalachians.

1. Native Appalachians

A native Appalachian is simply someone who was born in Appalachia or spent her formative childhood years in Appalachia. Because many distinctive human characteristics like accent or the way we talk are formed around birth,²⁸⁷ a native Appalachian might suffer locational prejudice even if she no longer lives in Appalachia. In fact, the two published cases examined below concern native Appalachians living and working outside of Appalachia.²⁸⁸ A native Appalachian may or may not consider Appalachia to be her current home.

²⁸³ Cf. Craig Robert Senn, *Perception Over Reality: Extending the ADA's Concept of "Regarded As" Protection Under Federal Employment Discrimination Law*, 36 FLA. ST. U. L. REV. 827, 827–30 (2009) (pointing out inconsistencies in the judicial interpretation of the Americans with Disabilities Act of 1990 and other federal employment discrimination laws concerning "erroneous discriminators" who intentionally discriminate against employees on the basis of misperceived disability).

²⁸⁴ See, e.g., Christopher A. Cooper et al., *A Geography of Appalachian Identity*, 51 SE. GEOGRAPHER 457 (2011).

²⁸⁵ For a discussion about the narrative battle over who is an Appalachian, see *supra* Section IV.A.1.

²⁸⁶ 40 U.S.C. § 14102 (2018).

²⁸⁷ See, e.g., Edwin Kiester, Jr., *Accents Are Forever*, SMITHSONIAN (Jan. 2001), <https://www.smithsonianmag.com/science-nature/accents-are-forever-35886605/>.

²⁸⁸ See *infra* Section IV.D.2, IV.D.3.

2. Resident Appalachians

A resident Appalachian is someone who may or may not have been born in Appalachia but moved to Appalachia later in life and now considers Appalachia to be her home.

3. Urban Appalachians

An urban Appalachian is a native Appalachian who was forced to leave Appalachia to find work. During the Great Migration of the 1940s to 1960s, four million resident Appalachians moved to Eastern and Midwestern cities in search of work.²⁸⁹ The two published cases examined below concerned urban Appalachians.²⁹⁰ Similar to first- or second-generation immigrants,²⁹¹ there can be first- or second-generation urban Appalachians, people who were born outside Appalachia, raised by urban Appalachians, and self-identify as Appalachian.

While locational prejudice in all forms should be illegal, should native, resident, or urban Appalachians receive different legal protections? Locational prejudice tends to occur in places away from the victim's home.²⁹² Consequently, urban Appalachians probably experience the greatest risk of locational prejudice.

Regardless of definition, unlike other forms of discrimination that are clearly forbidden under robust U.S. laws like the U.S. Constitution, state constitutions, and federal and state statutes,²⁹³ Appalachian discrimination remains legal.

²⁸⁹ *About Urban Appalachians*, URBAN APPALACHIAN COMMUNITY COALITION., <http://uacvoice.org/about-urban-appalchians/> (last visited Oct. 29, 2018) [hereinafter Urban Appalachian Community Coalition]; see also PHILLIBER ET AL., *supra* note 278, at 1; John J. Gilligan, *The Invisible Urban Appalachian*, 7 APPALACHIA: A J. DEVOTED TO THE SPECIAL PROBLEMS OF REGIONAL DEV. 24, 24 (1974) (claiming that “3.3 million persons moved out of Appalachia between 1950 and 1970[,] . . . equal[ing] more than half the number of foreigners who came to the United States to take up permanent residence during the same period”).

²⁹⁰ See *infra* Section IV.D.2, IV.D.3.

²⁹¹ See *Second-Generation Americans: A Portrait of the Adult Children of Immigrants*, PEW RES. CTR., <http://www.pewsocialtrends.org/2013/02/07/second-generation-americans/> (last visited Nov. 11, 2018) (defining first- and second-generation immigrants).

²⁹² There can of course exist intraregional locational prejudice. The intra-Appalachian Hatfield-McCoy Feud between the West Virginian Hatfields and the Kentuckian McCoys is an infamous example. See, e.g., LISA ALTHER, *BLOOD FEUD: THE HATFIELDS AND THE MCCOYS: THE EPIC STORY OF MURDER AND VENGEANCE* (2012). Although the same intersectional logic applies, intraregional locational prejudice is beyond the scope of this Essay.

²⁹³ See, e.g., JAMES A. KUSHNER, *GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION* (2017) (federal law); NAVEX GLOBAL, *LEGAL BRIEF: DISCRIMINATION LAWS: A 50-STATE SURVEY* (2012), https://www.navexglobal.com/en-us/file-download-canonical?file=/lb_Descrimination-50States.pdf&file-name=lb_Descrimination-50States.pdf (federal and state employment discrimination laws).

D. Appalachians Currently Lack Enforceable U.S. Legal Protections

Given locational prejudice's apparent political correctness,²⁹⁴ it is not surprising that Appalachians would suffer actual discrimination because of their Appalachian status. While there is a dearth of reliable urban Appalachian data, Fraley has collected statistical snapshots of police, housing, public accommodation, employment, and educational discrimination against urban Appalachians.²⁹⁵ In 1967, the U.S. Secretary of Agriculture Orville L. Freeman publically admitted that many urban Appalachians "are the victims of discrimination."²⁹⁶ In 1974, then Ohio Governor and Appalachian Regional Commission member²⁹⁷ John Gilligan remarkably admitted that majority urban "Appalachian ghettos"²⁹⁸ suffered from state sponsored discrimination.²⁹⁹

Although clearly sympathetic to Appalachian welfare, Governor Gilligan nevertheless exhibited inverse locational prejudice, more positive but just as paternalistic as pejorative presuppositions.³⁰⁰ Gilligan labeled urban Appalachians "an 'invisible constituency' in the urban areas to which they have gone."³⁰¹ To explain urban Appalachians' apparent political invisibility, the Governor committed the stereotyping sampling error.³⁰² Gilligan claimed that Appalachians fail to take advantage of "any efforts that might assist them in

²⁹⁴ See *supra* Part III.

²⁹⁵ Fraley, *supra* note 265, at 101–07 (internal citations omitted); see also Walker, *supra* note 204, at 345–48 (2013) (collecting authorities).

²⁹⁶ Fraley, *supra* note 265, at 105 n.93 (2013) (quoting Orville L. Freeman, Sec. of Agriculture, Speech: The Need for Rural-Urban Balance 7 (Feb. 27, 1967) (transcript available in Lyndon Baines Johnson Presidential Library) (internal quotation marks omitted).

²⁹⁷ Gilligan, *supra* note 289, at 25.

²⁹⁸ *Id.*

²⁹⁹ In the Appalachian Regional Commission's own official magazine, Governor Gilligan admitted:

There is a tendency in most cities to ignore or downgrade the provision of municipal services in these [Appalachian ghetto] areas. Garbage and trash are not picked up as often. Policing and health services are below par. And schools frequently are insensitive of the special needs of the Appalachian children. The epithet of "hillbilly" is hurled at them.

Gilligan, *supra* note 289, at 30.

³⁰⁰ See Stump & Lofaso, *supra* note 9. Harkins recognized that this "distinct but parallel construction, the stalwart, forthright, and picturesque mountaineer . . . premised on the same notion of a mythic . . . population wholly isolated from modern civilization" historically emerged in response to the humiliating hillbilly stereotype. HARKINS, *supra* note 211, at 4–5.

³⁰¹ Gilligan, *supra* note 289, at 24.

³⁰² See *supra* note 94 and accompanying text.

making the move to the city, either before they leave or when they arrive,”³⁰³ that “[b]y custom and tradition, Appalachian people prize family over organization,” and that they possess “a long-standing disinclination . . . to join organizations.”³⁰⁴

Because anti-Appalachian discrimination remains legal in the United States, urban Appalachians are often called an “invisible minority.”³⁰⁵ In 1879, while ironically invalidating a discriminatory law from Appalachian West Virginia, the U.S. Supreme Court hypothesized that “a law . . . excluding all naturalized Celtic Irishmen” from jury duty would be “inconsisten[t] with the spirit” of the Fourteenth Amendment Equal Protection Clause.³⁰⁶ “[N]aturalized Celtic Irishmen” could be a period euphemism for Appalachians.³⁰⁷ Since the infamous *Korematsu* Japanese internment case in 1944,³⁰⁸ however, the Court

³⁰³ Governor Gilligan claimed that less than 5% of job seeking urban Appalachians turn to the federal or state employment offices for help; they would rather go from one prospective employer to another looking for a job than stand in line or submit to what are construed as the humiliating procedures of a social service. The same attitude with respect to other public services was also found by [other Conference attendees]. Standing in line or filling out forms is not something an Appalachian takes kindly to.

Id. at 28.

³⁰⁴ *Id.* at 24. The problem with the Governor’s statement is not the data (although given the difficulty of comprehensively and consistently identifying urban Appalachians its accuracy probably is suspect). The problem is assuming that Appalachian cultural stupidity and backwardness are the causes. Why not let the incomplete data speak for itself and avoid relying on unsubstantiated stereotypical explanations? Or better yet, why not recognize that the mere fact that some Appalachians may require such help does not mean that *all* Appalachians require the same help? Moreover, why the inflexible, zero-sum tradeoffs? Can Appalachians not take advantage of both federal and state employment office services *and* personally talk to potential employers like any other person? Can Appalachians not prize family *and* organization like any other person? Can Appalachians not patiently wait in line or complete forms like any other person if they know their effort will be worth it?

Admittedly, U.S. popular and cultural mores have changed significantly over the 40-some years since Gilligan’s article. Notwithstanding the passage of time, imagine the public reaction if a current Governor made the same comments today about a racial group.

³⁰⁵ See, e.g., PHILLIBER ET AL., *supra* note 278; Fraley, *supra* note 265, at 99 n.25 (collecting authorities).

³⁰⁶ *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (striking down a West Virginia statute that excluded Blacks from jury duty as violating the Fourteenth Amendment’s Equal Protection Clause), *abrogated on other grounds by Taylor v. Louisiana*, 419 U.S. 522 (1975) (invalidating exclusion of women from jury duty).

³⁰⁷ See HARKINS, *supra* note 211, at 42, 63, 92, 130 (mentioning Celtic and Irish stereotypes associated with the hillbilly).

³⁰⁸ See *Korematsu v. United States*, 323 U.S. 214, 234–35 (1944) (Murphy, J., dissenting).

has consistently treated “national origin” discrimination the same as racial discrimination.³⁰⁹

The only published U.S. civil rights doctrine concerning Appalachians is from Cincinnati, Ohio. The U.S. federal district court there in two opinions declined to extend federal national origin protections to Appalachians. The City of Cincinnati’s 1992 Human Rights Ordinance explicitly protects Appalachians. To the authors’ knowledge, no U.S. executive, legislative, or judicial government branch at the federal, state, or local level has ever taken official action against any Appalachian discrimination.

1. One District Court Has Rejected Finding Appalachians a Protected “National Origin” Class Under the Civil Rights Act of 1964.³¹⁰

There are only two reported court opinions concerning Appalachian discrimination.³¹¹ Both reported opinions come from the U.S. District Court for the Southern District of Ohio, Western Division. The Western Division encompasses seven Appalachian counties and Cincinnati.³¹² Although Cincinnati is not considered part of Appalachia,³¹³ according to the Urban Appalachian Community Coalition, a study of census tract populations from 2005-2009 identified 35,637 Cincinnati residents (or 10.7% of Cincinnati’s 2009 total

³⁰⁹ See, e.g., *Hernandez v. Texas*, 347 U.S. 475, 478–79 (1954) (striking down Mexican-American jury exclusion). See generally KUSHNER, *supra* note 293 (collecting authorities).

³¹⁰ See generally 42 U.S.C. §§ 2000a to 2000e (2018).

³¹¹ See *Higginbotham v. Ohio Dep’t. of Mental Health*, 412 F. Supp. 2d 806, 813 (S.D. Ohio 2005); *Bronson v. Bd. of Educ.*, 550 F. Supp. 941, 959 (S.D. Ohio 1982). Should the district court or U.S. Court of Appeals for the Sixth Circuit ever wish to revisit this question of Appalachian “national origin” discrimination, both cases are distinguishable. Because the Plaintiffs in *Bronson* never responded to the Defendants’ Appalachian argument in their Opposition to the Defendants’ Motion to Dismiss, the legal issue was never really before the Court. *Bronson*, 550 F. Supp. at 959 (“Plaintiffs have not responded to this point . . . and have failed at any point to cite any authority indicating that . . . Appalachians . . . are within the purview of § 2000d. In fact, Plaintiffs have conceded that Appalachians share a national origin common with American citizens generally.”). The *Bronson* court decided to “assum[e] *arguendo* that the Plaintiffs [had] not abandoned their national origin claims.” *Id.* Likewise, the *Higginbotham* court found Plaintiff’s Title VII claims time barred and only addressed the legal question for the sake of argument. *Higginbotham*, 412 F. Supp. 2d at 812–13 (adding the caveat “procedural defects notwithstanding”).

³¹² Compare S.D. OHIO L.R. 82.1 (Venue of Actions within the District) (defining the “Western Division” as encompassing Cincinnati and the Ohio counties of Adams, Brown, Butler, Clermont, Clinton, Hamilton, Highland, Lawrence, Scioto, and Warren), <http://www.ohsd.uscourts.gov/sites/ohsd/files/Local%20Rules%20EFFECTIVE.January%201%202016.pdf>, with *Counties in Appalachia*, ARC, <https://www.arc.gov/counties> (listing all of the Western Division Ohio counties except Butler, Clinton, and Warren as being in Appalachia) (last visited Sept. 19, 2018).

³¹³ Urban Appalachian Community Coalition, *supra* note 289.

population³¹⁴) as urban Appalachians.³¹⁵ From 1985 to 1990, the largest social group migration to the greater Cincinnati area was the 20,894 new urban Appalachians.³¹⁶

In *Bronson v. Board of Education of the City School District of Cincinnati*,³¹⁷ Black and Appalachian parents unsuccessfully sought a preliminary and permanent injunction to enjoin Cincinnati Public Schools from closing a neighborhood school in violation of two federal civil rights acts.³¹⁸ Denying the injunction, the court also dismissed the Appalachian Plaintiffs because the court could find no authority that “national origin” in the Civil Rights Act of 1964 “was intended to include Appalachians or to include groups such as Appalachians who do not possess a national origin distinguishable from that of other citizens of the United States.”³¹⁹ The Plaintiffs did not appeal the district court’s decision.

Twelve years later, in 1994, the Equal Employment Opportunity Commission (EEOC) followed *Bronson*’s logic (without citing the opinion) in *Dewitt v. Rubin*.³²⁰ In *Rubin*, the EEOC affirmed the administrative dismissal of a so-called American-Kentuckian’s national origin employment discrimination claim, and held “that discrimination on the basis of one’s being from Kentucky is not tantamount to discrimination on the basis of national origin for Title VII [of the Civil Rights Act of 1964] purposes.”³²¹ While close, *Dewitt* remains

³¹⁴ In 2009, the U.S. Census reported Cincinnati’s total population as 333,012. *Census: Cincinnati’s Population Growing*, CINCINNATI ENQUIRER (May 21, 2015, 5:13 PM), <https://www.cincinnati.com/story/news/2015/05/21/census-cincinnati-population-growing/27709431/> (citing archived U.S. Census data).

³¹⁵ Urban Appalachian Community Coalition, *supra* note 289.

³¹⁶ Fraley, *supra* note 265, at 101 (citing Phillip J. Obermiller & Steven R. Howe, *Urban Appalachian and Appalachian Migrant Research in Greater Cincinnati: A Status Report*, URBAN APPALACHIAN COUNCIL 4–5 (2000), https://www.researchgate.net/profile/Steven_Howe/publication/237483190_Urban_Appalachian_and_Appalachian_Migrant_Research_in_Greater_Cincinnati_A_Status_Report/links/543d105a0cf24ef33b7669c8.pdf?origin=publication_detail); see also Michael Maloney & Christopher Auffrey, “Appalachian Cincinnati,” *The Social Areas of Cincinnati (Fourth Edition)*, <http://www.socialareasofcincinnati.org/report/Chapter5.html> (citing Phillip J. Obermiller and Michael Maloney, *The Current and Future Prospects of Urban Appalachians*, in FROM MOUNTAIN TO METROPOLIS: APPALACHIAN MIGRANTS IN AMERICAN CITIES (1994)).

³¹⁷ 550 F. Supp. 941 (S.D. Ohio 1982). This motion for preliminary injunction was filed under the ongoing *Bronson* school desegregation case that had begun in 1974. For the early history of the *Bronson* case, see *Bronson v. Bd. of Educ.*, 510 F. Supp. 1251, 1257–64 (S.D. Ohio 1980).

³¹⁸ Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 1983 (2018), 41 U.S.C. § 2000d (2018); see also *Bronson*, 550 F. Supp. at 944.

³¹⁹ *Bronson*, 550 F. Supp. at 959–60 (citing H.R. Rep. No. 914, 88th Cong., 2d Sess., reprinted in 1964 U.S. CODE CONG. & AD. NEWS 2355, 2391–2409).

³²⁰ Appeal No. 01945384, 1995 WL 481354 (E.E.O.C. Aug 10, 1995).

³²¹ *Id.* at *2 (interpreting 42 U.S.C. §§ 2000e-2(a) to (d) (2018)).

inapposite because, according to the statutory definition of Appalachian, some—but not all—of Kentucky is considered part of Appalachia.³²²

Twenty-three years later, in 2005, a White Appalachian female nurse, Linda Higginbotham, unsuccessfully sued her former employer, the State of Ohio Department of Mental Health, and her former supervisors for employment discrimination under Title VII and other statutes.³²³ Among her factual allegations, the Plaintiff claimed that when she told her nursing supervisor that her Appalachian “kinfolk” were coming to visit her for the December holidays, the supervisor “responded to this information with a frown and said nothing.”³²⁴ Later, the supervisor allegedly referred to the Plaintiff as a “white Appalachian hillbilly.”³²⁵ Unsurprisingly, the *Higginbotham* court followed *Bronson* and declined to extend federal national origin protections to Appalachians “because Appalachian ancestry has not been recognized as a protected status under any federal law to date.”³²⁶ The Plaintiff did not appeal the court’s grant of summary judgment for the Defendants.

Although the EEOC³²⁷ and federal courts have expanded federal national origin protections to include subnational groups from current or defunct foreign nations like the Kurds,³²⁸ the Roma (Gypsies),³²⁹ Hispanics,³³⁰ Arabs,³³¹

³²² See 40 U.S.C. § 14102 (2018).

³²³ *Higginbotham v. Ohio Dep’t. of Mental Health*, 412 F. Supp. 2d 806, 813 (S.D. Ohio 2005).

³²⁴ *Id.* at 810.

³²⁵ *Id.*

³²⁶ *Id.* at 813.

³²⁷ See Jacqueline Grace Diaz, *The Divided States of America: Reinterpreting Title VII’s National Origin Provision to Account for Subnational Discrimination Within the United States*, 162 U. PA. L. REV. 649, 667 (2014) (quoting *Kanaji v. Child. Hosp. of Phila.*, 276 F. Supp. 2d 399, 402 (E.D. Pa. 2003) (citing Guidelines on Discrimination Because of National Origin, 45 FED. REG. 85,632, 85,633 (Dec. 29, 1980) (codified at 29 C.F.R. § 1606.1)) (EEOC national origin interpretation guidelines amended “to replace ‘country of origin’ with ‘place of origin’”).

³²⁸ See 2 EEOC COMPLIANCE MANUEL (BNA) § 622:0002 (2002).

³²⁹ See *id.*

³³⁰ Diaz, *supra* note 327, at 668 (citation omitted).

³³¹ *Id.* (citation omitted).

Acadians (Cajuns),³³² Serbians,³³³ Creoles,³³⁴ and Hopis,³³⁵ they have refused to extend the same protections to domestic subnational groups like Confederate Southern Americans.³³⁶ In so doing, both the EEOC and federal courts have stayed consistent with *Bronson's* original reasoning. As the Third Circuit explained, “[w]here one cannot trace ancestry to a nation outside the United States, a former regional or political group within the United States . . . does not constitute a basis for a valid national origin classification.”³³⁷

From a doctrinal standpoint, the obvious change would be to eliminate the formalistic requirement of tracing ancestry to a nation outside the United States from the national origin classification. Although no court has yet done so, at least two articles have advocated for such a doctrinal change.³³⁸

2. Cincinnati’s Human Rights Ordinance is the only known U.S. law that protects Appalachians from discrimination.

Proceeding chronologically, this Section examines (i) the Cincinnati City Council’s initial hearings and findings; (ii) the Human Rights Ordinance that resulted; (iii) its preemption by state and federal law; and (iv) its enforcement.

i. City Hearings and Findings

In 1992, the Cincinnati City Council held hearings concerning a proposed Human Rights Ordinance to be added to its Municipal Code. In addition to the traditional protected classes of race, gender, age, color, religion, disability status, marital status, ethnic origin, and national origin,³³⁹ the Ordinance added two—then novel—protected classes: sexual orientation and

³³² *Roach v. Dresser Indust. Valve & Instrument Div.*, 494 F. Supp. 215, 218 (W.D. La. 1980). Although Acadia has never been a foreign country, the district court nevertheless extended national origin protections because Acadians historically came to the U.S. from the former French colony Acadia (present day Nova Scotia). *Id.* at 217–18. *Accord* *Bourgeois v. U.S. Coast Guard*, 151 F. Supp. 3d 726, 736 (W.D. La. 2015).

³³³ *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 673 (9th Cir. 1988).

³³⁴ *Metoyer v. Kansas*, 874 F. Supp. 1198, 1202–03 (D. Kan. 1995).

³³⁵ *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1118 (9th Cir. 1998).

³³⁶ *Storey v. Burns Int’l Sec. Servs.*, 390 F.3d 760, 765 (3d Cir. 2004); *Williams v. Frank*, 757 F. Supp. 112, 120 (D. Mass. 1991) (holding, in a case where the plaintiff was mocked because of his accent, that “[s]outhernness is not a protected trait.”).

³³⁷ *Storey*, 390 F.3d at 766 (Scirica, C.J., concurring).

³³⁸ See *Diaz*, *supra* note 327, at 667–71; *Walker*, *supra* note 207, at 338.

³³⁹ CINCINNATI, OHIO, CODE OF ORDINANCES 490 (July 29, 1992) (Council meeting voting sheet on file with authors).

Appalachian regional origin.³⁴⁰ As the First District of the Ohio Court of Appeals later determined, Ohio law at the time explicitly excluded sexual orientation from state discrimination protection.³⁴¹ Federal law was more than a decade away from recognizing that same-sex couples had the right to marry.³⁴²

Although the sexual orientation language was extremely controversial at the time (and would be repealed through a referendum amending the City Charter the following year),³⁴³ the Appalachian regional origin language reportedly was not controversial.³⁴⁴ Apparently, the Ordinance was originally proposed to add only one novel protected class, sexual orientation. Mike Maloney³⁴⁵—Founder and former Director of the Cincinnati Urban Appalachian Council (UAC), city planner, Plaintiff's expert witness in *Bronson*,³⁴⁶ and a married gay man—

³⁴⁰ *Id.*

³⁴¹ *Greenwood v. Taft*, 663 N.E.2d 1030, 1032 (Ohio Ct. App. 1995) (interpreting OHIO REV. CODE ANN. §§ 4112.01(A)(13) and (16)(b) (2018)).

³⁴² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

³⁴³ In response to the City Charter amendment, the City Council removed sexual orientation from the Human Rights Ordinance's protected classes in 1995. The contested referendum Issue 3 amending the Cincinnati City Charter to prohibit sexual orientation protections in the Human Rights Ordinance was eventually overruled by the application of the U.S. Supreme Court's opinion in *Romer v. Evans*, 517 U.S. 620 (1996). See *Equality Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997), *vacated and remanded by* 518 U.S. 1001 (1996) (summarizing court proceedings); Mark Strasser, *Same-Sex Marriage Referenda and the Constitution: On Hunter, Romer, and Electoral Process Guarantees*, 64 ALB. L. REV. 949, 962 (2001).

Another popular referendum repealed the earlier City Charter amendment in 2004. In 2006, the Cincinnati City Council voted 8 to 1 to reinstate sexual orientation as a protected class and include transgender in its sexual orientation definition in the Human Rights Ordinance. Eric Resnick, *Cincinnati Passes LGBT Human Rights Ordinance: City Becomes Ohio's 13th With Such a Measure*, GAY PEOPLE'S CHRON. (Mar. 17, 2006), <http://www.gaypeopleschronicle.com/stories06/march/0317061.htm>; see also CINCINNATI, OHIO, MUNICIPAL CODE § 914-1-S, https://library.municode.com/oh/cincinnati/codes/code_of_ordinances?nodeId=TITIXMI_CH914_UNDIPR (last visited Oct. 29, 2018).

³⁴⁴ *Mountain People as an Urban Minority*, WASH. POST (Dec. 27, 1993), https://www.washingtonpost.com/archive/politics/1993/12/27/mountain-people-as-an-urban-minority/b4cced8b-4c96-44e7-8a5b-5c47d9167f34/?utm_term=.16f862bb8012 [hereinafter *Mountain People*].

³⁴⁵ Michael Mahoney explained that he observed constant Appalachian discrimination against his sister starting when he was age 11. Interview with Michael Maloney, Founding Policy Director of the Urban Appalachian Council, and Maureen Sullivan, First President of the Urban Appalachian Council, Cincinnati, Ohio (Nov. 17, 2017) [hereinafter *Maloney & Sullivan Interview*] (transcript on file with *West Virginia Law Review*). Maloney said he conceived of the idea of Appalachians as a protected class to provide them with structural protection against overt and covert discrimination. *Id.* He also stated that he spearheaded the amendment with Virginia Coffrey, a Black urban Appalachian from West Virginia, and Ernie Mynatt, an urban Appalachian from Kentucky. *Id.*

³⁴⁶ *Bronson v. Bd. of Educ.*, 550 F. Supp. 941, 945 (S.D. Ohio 1982).

successfully lobbied to add the Appalachian regional origin language to the proposed Ordinance.³⁴⁷

Chief Counsel of the Cincinnati City Solicitor's Office Rodney Prince, who helped draft the Human Rights Ordinance, later stated that he was against the inclusion of Appalachians in the Ordinance because he "simply did not feel that there was one identifiable [Appalachian] group out there . . . experiencing discrimination."³⁴⁸ Prince clarified that he could not say he did not think it was necessary at the time "because there was testimony about real problems."³⁴⁹ While the hearings revealed problems Appalachians faced because of locational prejudice, Maureen Sullivan,³⁵⁰ then Director of UAC, reportedly could not recall any documented instance where a Cincinnati had been denied housing or a job because she was Appalachian.³⁵¹

After the hearings concluded, the Cincinnati City Council found "that discrimination in employment, housing, and public accommodation, based on . . . Appalachian regional origin" and the other protected classes in the proposed Ordinance "adversely affects the health, welfare, peace, and safety of the Cincinnati community."³⁵² After a 7-2 vote,³⁵³ Cincinnati passed a Human Rights Ordinance now codified in Chapter 914, Unlawful Discriminatory Practices.³⁵⁴ One of the seven Councilmembers who voted to adopt the Ordinance was Black Councilman Dwight Tillery. Tillery admitted that he initially found the Appalachian inclusion in the proposed Ordinance "interesting" but voted for the Ordinance anyway, concluding, "what harm" could the inclusion cause?³⁵⁵

³⁴⁷ Thomas E. Wagner, Phillip J. Obermiller & Melinda B. Wagner, *Fifty Years of Appalachian Advocacy: An Interview with Mike Maloney*, J. OF APPALACHIAN STUDIES 174, 175 (Spring/Summer 2013) [hereinafter *Mike Maloney*].

³⁴⁸ *Mountain People*, supra note 344.

³⁴⁹ *Id.*

³⁵⁰ Sullivan explained that she was raised by an Appalachian mother and Irish father. She stated that she grew up in the Appalachian Cincinnati community where, in her words, she saw the sheer resilience, goodness, and beauty of people who were struggling to improve themselves while combating regional discrimination. Maloney & Sullivan Interview, supra note 345. For her, their story of "working together and coming together" to repel the "systemic issues that needed to be addressed" made the fight worth it. *Id.*

³⁵¹ *Id.*

³⁵² CINCINNATI, OHIO, CODE OF ORDINANCES 490 (July 29, 1992) (Council meeting voting sheet on file with authors).

³⁵³ Kimberly B. Dugan, *Just Like You: The Dimensions of Identity Presentations in an Antigay Contested Context*, in IDENTITY WORK IN SOCIAL MOVEMENTS 25 (Jo Reger, Daniel J. Myers, & Rachel L. Einwohner eds., Univ. of Minnesota Press 2008).

³⁵⁴ CINCINNATI, OHIO, MUNICIPAL CODE § 914.

³⁵⁵ Pasternak, supra note 279.

ii. *The Human Rights Ordinance*

The Cincinnati Human Rights Ordinance is apparently the only civil rights law in the United States with Appalachians as a protected class.³⁵⁶ It defines “Appalachian regional origin” as “birth or ancestral origin from that area of the eastern United States consisting of the counties listed in an Appalachian Regional Origin Document which shall be maintained on file with the Clerk of Council.”³⁵⁷ The Clerk’s Appalachian Regional Origin Document has mirrored ARC’s definition of Appalachia.³⁵⁸ “Discriminate” is defined as “to unlawfully segregate, separate or treat individuals differently based on . . . Appalachian regional origin.”³⁵⁹

The Ordinance explicitly proscribes restrictive covenants,³⁶⁰ housing discrimination,³⁶¹ and employment discrimination³⁶² against Appalachians. It empowers the City Manager to appoint “a Complaint Officer” to enforce these provisions. As such, the Complaint Officer “may conduct investigations, hearings, and conciliation, make determinations, issue orders and perform such duties as are necessary and appropriate.”³⁶³

iii. *Preemption and Applicability*

Although the Cincinnati Human Rights Ordinance only applies within the geographic boundaries of the City of Cincinnati,³⁶⁴ cities like Cincinnati can mandate additional civil rights protections above state and federal protections provided the city protections do not conflict with state and federal protections.³⁶⁵

³⁵⁶ *Accord* Harkins, *supra* note 211, at 213; Diaz, *supra* note 327, at 665 (citation omitted); Mike Maloney, *supra* note 345, at 175.

³⁵⁷ CINCINNATI, OHIO, MUNICIPAL CODE § 914-1-A1.

³⁵⁸ *Compare* CINCINNATI, OHIO, CODE OF ORDINANCES 490 (July 29, 1992), with 40 U.S.C. § 14102 (2018).

³⁵⁹ CINCINNATI, OHIO, MUNICIPAL CODE § 914-1-D1.

³⁶⁰ *Id.* § 914-1-R.

³⁶¹ *Id.* § 914-3.

³⁶² *Id.* § 914-5.

³⁶³ *Id.* § 914-9(A).

³⁶⁴ *See* OHIO CONST. art. XVIII, § 3 (“Municipal powers of local self government”).

³⁶⁵ *See generally* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113 (2007); Michèle Finck, *The Role of Localism in Constitutional Change: A Case Study*, 30 J. L. & POL. 53 (2014); Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897 (2013); Chad A. Readler, *Local Government Anti-Discrimination Laws: Do They Make a Difference*, 31 U. MICH. J. L. REFORM 777, 780–82 (1998); George D. Vaubel, *Toward Principles of State Restraint upon the Exercise of Municipal Power in Home Rule*, 22 STETSON L. REV. 643 (1993).

The U.S. Supreme Court has held that states are free to allocate power between state and local rule as they see fit.³⁶⁶

Ohio is considered a “home rule” state where “[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with” state law.³⁶⁷

iv. Enforcement

Except for Appalachian regional origin, all other protected classes in the Cincinnati Human Rights Ordinance are now also protected by federal and state law.³⁶⁸ Recognizing that federal or state enforcement authorities would probably preempt any serious investigation into alleged discrimination of the overlapping protected classes, the Ordinance’s unique complaint procedure³⁶⁹ only applies when the “state or federal government has not exercised jurisdiction and provided mechanism for redress.”³⁷⁰ With Appalachian regional origin

³⁶⁶ See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 176 (1907) (“We have nothing to do with the interpretation of the Constitution of the state and the conformity of the enactment of the assembly to that Constitution; those questions are for the consideration of the courts of the state, and their decision of them is final.”)

³⁶⁷ OHIO CONST. art. XVIII, § 2; see also *Home Builders Ass’n v. Beavercreek*, 729 N.E.2d 349 (Ohio 2000); *Fitzgerald v. Cleveland*, 103 N.E. 512 (Ohio 1913). See generally Stuart Meck & Kenneth Pearlman, *The Home Rule Amendment of the Ohio Constitution*, OH. PLAN. & ZONING L. § 3:2 (2017); Jonathon Angarola, *Ohio’s Home-Rule Amendment: Why Ohio’s General Assembly Creating Regional Governments Would Combat the Regional Race to the Bottom Under Current Home-Rule Principles*, 63 CLEV. ST. L. REV. 865 (2015); Mark A. Tumeo, *Civil Rights for Gays and Lesbians and Domestic Partner Benefits: How Far Could an Ohio Municipality Go?*, 50 CLEV. ST. L. REV. 165, 173 (2003) (collecting authorities).

³⁶⁸ See generally KUSHNER, *supra* note 293; OHIO REV. CODE ANN. § 4112 (West 2018) (“Civil Rights Commission”); OHIO ADMIN. CODE, § 4112 (2018) (“Civil Rights Commission”) (Ohio state laws).

³⁶⁹ Section 914-9(B)(2) states:

If informal methods of conciliation fail to effect the elimination of such alleged unlawful discriminatory practice and it is determined by the Complaint Officer that the alleged unlawful discriminatory practice is conduct over which the state and/or federal government has exercised jurisdiction and provided a mechanism for redress to an aggrieved party, the Complaint Officer shall notify the complainant and respondent that no other action will be taken pursuant to this chapter and will provide complainant with information relating to appropriate state or federal legislation and enforcement agencies which may have jurisdiction.

CINCINNATI MUNICIPAL CODE § 914-9(B)(2).

³⁷⁰ *Id.* §§ 914-9(B)(3), 914-15.

discrimination, however, the City's Complaint Procedure remains the *sole* means of enforcement.³⁷¹

If not preempted by state or federal enforcement authorities, the Complaint Officer can hold a determination hearing concerning the alleged Human Rights Ordinance violation.³⁷² The Complaint Officer also can issue a notice of violation and order to cease and desist.³⁷³ Thirty days after service of the cease and desist order, if the alleged violator "has not eliminated or corrected the unlawful discriminatory practice," then the Complaint Officer can fine the alleged violator "\$100 per day for each day of substantial non-compliance" with this Ordinance "not to exceed a total of \$1,000."³⁷⁴ Failure to comply with a cease and desist order is a "misdemeanor of the fourth degree,"³⁷⁵ punishable by a maximum \$250 fine or 30 days imprisonment for individuals³⁷⁶ and up to a \$2,000 fine for organizations.³⁷⁷

3. What distinguishes Appalachians from other domestic subnational groups is the official recognition by the federal government and nine states of discrimination against Appalachians.

As the Congressional Research Service observed, "[t]hroughout the twentieth century, events occurred which caused Americans to perceive that Appalachia was a separate region isolated from the rest of the country."³⁷⁸ National television coverage of the 1960 Presidential campaign highlighted Appalachia's appalling poverty.³⁷⁹ In March 1963, when a record-breaking flood

³⁷¹ Since the Ordinance's passage, no one apparently has filed a complaint alleging Appalachian regional origin discrimination with the Office of Administrative Hearings. Interview with Thomas Beridon, Chief Hearing Examiner of the City of Cincinnati Office of Administrative Hearings, Cincinnati, Ohio (Nov. 17, 2017). As Maloney said, "Historically and to this day, Appalachians don't expect much. Why would you complain to [the government] because you never expected [the government] to do anything for you." Maloney and Sullivan Interview, *supra* note 345. Instead, according to Maloney and Sullivan, Appalachians have turned inward to their own communities for support. *Id.* Today, Cincinnatians likely do not know about the Ordinance's protection of Appalachians because such protection is not widely advertised in the community. Thomas Beridon, *supra* note 371.

³⁷² CINCINNATI, OHIO, MUNICIPAL CODE § 914-9(B)(3).

³⁷³ *Id.* § 914-9(B)(5).

³⁷⁴ *Id.* § 914-11.

³⁷⁵ *Id.* § 914-13.

³⁷⁶ *Id.* § 902-7(c)(4).

³⁷⁷ *Id.* § 902-5.

³⁷⁸ CONG. RESEARCH SERV., SUMMARY AND ANALYSIS OF THE LEGISLATIVE HISTORY OF THE APPALACHIAN REGIONAL DEVELOPMENT ACT OF 1965 AND SUBSEQUENT AMENDMENTS: A REPORT 1 (1985) [hereinafter Congressional Research Service].

³⁷⁹ *Id.* at 2.

devastated central Appalachia,³⁸⁰ President John F. Kennedy met with the affected state governors, asking what he could do to help. The ultimate result of that meeting was the formation of the President's Appalachian Regional Commission (PARC).³⁸¹

PARC's members were representatives from the nine Appalachian governors' offices of Alabama, Georgia, Kentucky, Maryland, North Carolina, Pennsylvania, Tennessee, Virginia, and West Virginia; and the major federal agencies operating in Appalachia—the Area Redevelopment Administration; Atomic Energy Commission; National Aeronautics and Space Administration (NASA); Small Business Administration; Tennessee Valley Authority; and the U.S. Departments of Agriculture; Defense; Health, Education, and Welfare (the precursor of the Departments of Education and Health and Human Services); Interior; Labor; and Treasury.³⁸²

Shortly before his death, Kennedy charged PARC “to prepare a comprehensive action program for the economic development of the Appalachian Region.”³⁸³ After Kennedy's assassination, President Lyndon Johnson directed PARC to write their recommendations in a 1964 report.³⁸⁴

In *Appalachia: A Report by the President's Appalachian Regional Commission*, PARC recommended the creation of a “regional organization to allow maximum use of both existing and new resources in a continuing development effort.”³⁸⁵ PARC's recommendation resulted in Congress passing the Appalachian Regional Development Act (ARDA) to create the Appalachian Regional Commission (ARC) in 1965.³⁸⁶

Although ARC remains the first federal regional authority or commission,³⁸⁷ Congress has subsequently created at least six additional regional

³⁸⁰ J.O. ROSTVEDT, U.S. DEPT. OF THE INTERIOR, SUMMARY OF FLOODS IN THE UNITED STATES DURING 1963, GEOLOGICAL SURVEY WATER-SUPPLY PAPER 1830-B, at B28 (1968), <https://pubs.usgs.gov/wsp/1830b/report.pdf>.

³⁸¹ Congressional Research Service, *supra* note 378, at 3.

³⁸² *Id.* at ix.

³⁸³ *Appalachia Report*, *supra* note 273, at II.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ Appalachian Regional Development Act, 40 U.S.C. §§ 14101–14704 (2018).

³⁸⁷ ARC's historical predecessor was the New Deal Tennessee Valley Authority (TVA), which was originally responsible for developing a geographic area that included the mountainous regions of six Appalachian states. See 16 U.S.C. § 22 (2018). The reason why the TVA is no longer considered a regional authority or commission is because the TVA morphed into a public energy utility. See *About TVA*, TVA, <https://www.tva.gov/About-TVA> (last visited Oct. 29, 2018) (stating that the TVA “is a corporate agency of the United States that provides electricity for business customers and local power companies serving 9 million people in parts of seven southeastern states”); see also *Our History*, TVA, <https://www.tva.gov/About-TVA/Our-History> (last visited Oct. 29, 2018).

authorities or commissions to coordinate geographic development efforts.³⁸⁸ Out of all federal regional authorities or commissions, ARC is the only one arguably dedicated to one subnational area and group, that of Appalachia and Appalachians. Although the 2018 federal budget blueprint initially proposed eliminating funding for ARC,³⁸⁹ Congress subsequently restored ARC's funding in its 2018 budget and confirmed a new ARC Co-Chair.³⁹⁰

In 1964 and 1965, the federal government and nine state governments took official notice not only that the "Appalachian people"³⁹¹ constitute a distinct subnational group in the United States but also that these governments have a responsibility to remedy the unfair treatment the Appalachian people have received in comparison to the rest of the United States. This remarkable *de jure* recognition of the "national liability" for the Appalachian people's "individual

³⁸⁸ The Delta Regional Authority was created in 1988 to oversee redevelopment of the Lower Mississippi Delta Region. 7 U.S.C. § 2009aa-1 (2018); EUGENE BOYD, CONG. RESEARCH SERV. REP. (RL33076), FEDERAL REGIONAL AUTHORITIES AND COMMISSIONS: THEIR FUNCTION AND DESIGN 15 (Sept. 21, 2006). The Northern Great Plains Rural Development Commission was created in 1994 to oversee redevelopment of rural Northern Great Plains communities. 7 U.S.C. § 2009bb (2018); Boyd, *supra* at 25. The Denali Commission was created in 1998 to oversee redevelopment of rural areas in Alaska. 42 U.S.C. § 15911 (2018); Boyd, *supra* at 28. The Southeast Crescent Regional Commission was created in 2008 to oversee redevelopment of "all counties of the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Florida not already served by the Appalachian Regional Commission or the Delta Regional Authority." 40 U.S.C. § 15731 (2018). The Southwest Border Regional Commission was created in 2008 to oversee redevelopment in selected counties in Arizona, California, New Mexico, and Texas. 40 U.S.C. § 15732 (2018). The Northern Border Regional Commission was created in 2008 to oversee redevelopment in selected counties in Maine, New Hampshire, New York, and Vermont. 40 U.S.C. § 15733 (2018). See generally *Federal-State Regional Commissions*, NAT'L ASS'N OF DEV. ORGS., <https://www.nado.org/category/commissions/> (last visited Oct. 29, 2018).

³⁸⁹ OFFICE OF MGMT. & BUDGET EXEC. OFFICE OF THE PRESIDENT, AMERICA FIRST: A BUDGET BLUEPRINT TO MAKE AMERICA GREAT AGAIN 5 (2017). See also Alana Abramson, *President Trump's Budget Proposes Eliminating This Commission. 95% of Counties It Helps Voted for Him*, TIME (May 24, 2017), <http://time.com/4793315/donald-trump-budget-appalachian-regional-commission/>. Every year from 1981 to 1988, the Reagan Administration tried unsuccessfully to close the ARC. Andrew Isserman & Terance Reppann, *The Economic Effects of the Appalachian Regional Commission: An Empirical Assessment of 26 Years of Regional Development Planning*, 61 J. AM. PLAN. ASS'N, 345, 345 (1995).

³⁹⁰ See Hank Hayes, *Remember the Appalachian Regional Commission?*, TIMES NEWS (TENNESSEE) (Mar. 5, 2018, 8:30 AM), <http://www.timesnews.net/Business/2018/03/05/div-class-libPageBodyLinebreak-br-div-51>; see also Becca Schimmel, *McConnell Aide Takes Appalachian Regional Commission Role*, W. VA. PUB. RADIO (May 7, 2018), <http://www.wvpublic.org/post/mcconnell-aide-takes-appalachian-regional-commission-role#stream/0> (stating new ARC co-chair said he can see a day when the Appalachian Regional Commission is no longer needed but not anytime soon).

³⁹¹ *Appalachia Report*, *supra* note 273, at 21.

distress” could arguably justify federal discrimination protections for Appalachians.³⁹²

Enshrined in federal statute is the legislative finding that “Congress finds and declares that the Appalachian region of the United States . . . lags behind the rest of the Nation in its economic growth and that its people have not shared properly in the Nation’s prosperity.”³⁹³

In its report, officially adopted by the federal government and nine state governments,³⁹⁴ PARC observed that the “average Appalachian . . . has not matched his counterpart in the rest of the United States as a participant in the Nation’s economic growth”³⁹⁵ and that Appalachians have been “too frequently deprived of the facilities and services of a modern society.”³⁹⁶ PARC also may have implicitly admitted that the government had treated the rest of the country more favorably than Appalachia:

What [PARC] has found is a record of insufficiency—a history of traditional acts *not* performed, of American patterns *not* fulfilled. This sets Appalachia apart from the rest of the Nation The sins of commission in Appalachia are numerous and as opaque as history: what was omitted—the traditional pattern of growth thwarted by this neglect—is, on the other hand, transparent and may be simply stated.³⁹⁷

While these official factual findings concerning Appalachian injustice could arguably support the extension of traditional civil rights protections to

³⁹² *Id.* The question of whether these remarkable federal public admissions could constitute *de jure* discrimination is beyond the scope of this Essay.

³⁹³ 40 U.S.C. § 14101(a) (2018) (1965 Findings and Purpose).

³⁹⁴ The Alabama, Georgia, Kentucky, Maryland, North Carolina, Tennessee, Virginia, and West Virginia state governors all signed a letter stating that they had “studied the report” and “its recommendations,” “want[ed] to express [their] approval of the principles and actions provided for” in the report, and “pledge[d] [their] separate and associated support in working within [their] States and throughout the region to bring into action the . . . program the report proposes.” *Appalachia Report, supra* note 273, at IV. The Governor of Pennsylvania signed a separate letter because he disagreed with the proposed structure of the ARC. *Id.* at VI–VII. The U.S. Secretaries of Agriculture; Commerce; Defense; Health, Education, and Welfare; Interior; and Treasury; the Administrators of the Area Redevelopment Administration; Small Business Administration; and National Aeronautics and Space Administration; the Chairmen of the Atomic Energy Commission; and the Tennessee Valley Authority signed a letter expressing their “support for the action program outlined in the report” and pledging the federal government’s “full participation” in the report’s program “and its implementation.” *Id.* at IX. Finally, Congress stated in a federal statute, “Congress recognizes the comprehensive report of the President’s Appalachian Regional Commission documenting these findings.” 40 U.S.C. § 14101(a) (1965 Findings and Purpose).

³⁹⁵ *Appalachia Report, supra* note 273, at XV.

³⁹⁶ *Id.* at 16.

³⁹⁷ *Id.*

Appalachians, the reality is that locational prejudice not only is multidimensional and more complicated than traditionally proscribed prejudice like racism but also can encompass racism and other more one-dimensional forms of traditional prejudice.

E. Place and Space Are More Complicated than Race

Appalachian discrimination needs a legal remedy. While this Essay is not against the extension of existing civil rights law to apply to Appalachians or new legislation explicitly to protect Appalachians, it recognizes the limitations of the traditional civil rights approach. As Appalachians have experienced under current U.S. law, the problem with protected classes is that drawing such limited legal boundaries publicly and officially communicates that it is acceptable to discriminate against people who lie outside those boundaries.³⁹⁸ On the other hand, legal rules—particularly standing or jurisdictional rules—need to be clear and easy to apply.³⁹⁹

Location compounds and confounds this tension between oversimplification and clarity. We all need literal and figurative space to live, work, and flourish.⁴⁰⁰ While all public policy involves tradeoffs, perhaps none are as zero sum as place and space.

In particular, locational prejudice is difficult to capture appropriately with clear and easily applied rules because location intersects with many other protected classes; location can make a substantive difference in housing, employment, and education; and location conveys demographic truths and useful empirical data.

1. Location Intersects with Many Other Protected Categories Like Race and Gender

Addressing discrimination of a single protected class is difficult enough, but addressing the intersection of multiple protected classes is even more complex.⁴⁰¹ For example, when faced with limited resources or imperfect formalist legal categories, should antidiscrimination law treat a transgendered Black Appalachian woman differently from a straight White Appalachian man? How about a transgendered Black Appalachian woman versus a transgendered Black female New Yorker? Is one more deserving of legal protection than the other? Should an individual who happens to live at the diverse intersection of a

³⁹⁸ Fraley, *supra* note 265, at 98.

³⁹⁹ *Accord* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 321 (2005) (Thomas, J., concurring) (“Jurisdictional rules should be clear.”).

⁴⁰⁰ See WOOLF, *supra* note 52, at 3–4, 21, 79.

⁴⁰¹ See, e.g., Terman, *supra* note 209, at 73.

number of protected classes benefit from all of them, or is one protection enough? Should law prioritize certain protected classes above others? Law obviously cannot protect everyone; what are its proper limits?

Although many protected classes have definitional problems,⁴⁰² Appalachian regional identity is particularly difficult to define. For example, according to the ARDA's geographic definition, Allegheny County, Pennsylvania, which contains the city of Pittsburgh, is considered part of Appalachia.⁴⁰³ With Pittsburgh within its borders, Allegheny County is doing much better than most of Appalachia and most of Pennsylvania.⁴⁰⁴ According to 2012 data, its average earnings per job were \$54,798, higher than Pennsylvania's \$49,519 average and the national \$49,468 average.⁴⁰⁵ As far as annual employment growth from 2009-2012, Allegheny County's 0.9% average exceeded Pennsylvania's 0.8% average but was slightly below the national 1.0% employment growth average.⁴⁰⁶ Home of the National Football League Pittsburgh Steelers, National Hockey League Pittsburgh Penguins, Major League Baseball Pittsburgh Pirates,⁴⁰⁷ and at least ten higher education institutions including the University of Pittsburgh, Carnegie Mellon University, and Duquesne University,⁴⁰⁸ Allegheny County had 4,863,300 people in 2016 which made it the 24th most populous county in the nation.⁴⁰⁹

⁴⁰² For example, U.S. law no longer defines race as specifically (and repugantly) as Louisiana's "one drop" rule. *See Plessy v. Ferguson*, 133 U.S. 587 (1890), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *see also* Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375 (1999).

⁴⁰³ *See* Brian O'Neill, *Yes, We and Yinz are Part of Appalachia*, PITT. POST-GAZETTE (Dec. 8, 2011, 5:00 AM), <http://www.post-gazette.com/opinion/brian-oneill/2011/12/08/Yes-we-and-yinz-are-part-of-Appalachia/stories/201112080418>. O'Neill calls Pittsburgh the "Paris" of Appalachia. BRIAN O'NEILL, *THE PARIS OF APPALACHIA: PITTSBURGH IN THE 21ST CENTURY* (2009).

⁴⁰⁴ *See Allegheny County, PA*, ECON. DIVERSITY IN APPALACHIA, <http://economicdiversityinappalachia.creconline.org/Profiles/?Fips=42003> (last visited Nov. 1, 2018) [hereinafter ECON. DIVERSITY IN APPALACHIA]; *see also* EDWARD FESER ET AL., APPALACHIAN REG'L COMM'N, ECONOMIC DIVERSITY IN APPALACHIA 86, 106 (2014).

⁴⁰⁵ ECON. DIVERSITY IN APPALACHIA, *supra* note 404.

⁴⁰⁶ *Id.*

⁴⁰⁷ *See Pittsburgh Sports Teams*, VISITPITT., <https://www.visitpittsburgh.com/things-to-do/pittsburgh-sports-teams/> (last visited Nov. 1, 2018).

⁴⁰⁸ *See Member Schools*, PITT. COUNCIL ON HIGHER EDUC., <https://pche-pa.org/members/> (last visited Oct. 29, 2018).

⁴⁰⁹ *See Allegheny County, PA Profile*, BEARFacts, U.S. DEP'T OF COM., BUREAU OF ECON. ANALYSIS, <https://apps.bea.gov/regional/bearfacts/pdf.cfm?tips=42003&areatype=42003&geotype=4> (last visited on Nov. 11, 2018).

Historically, Allegheny County has enjoyed the patronage of wealthy donors like Andrew Carnegie and Henry Phipps.⁴¹⁰ At the end of the 19th century, the *New York Tribune's American Millionaires* found 44 millionaires living in Allegheny County.⁴¹¹ In 2010 dollars, those 44 millionaires would be billionaires today.⁴¹² In 2017, Livability.com, a website that annually evaluates cities with 20,000-350,000 people, ranked Pittsburgh its 19th most livable city.⁴¹³ Should people from Allegheny County receive the same legal protections as other Appalachians? How about the six Appalachian counties in the Atlanta, Georgia, metropolitan service area that have grown more than 250% since 1980?⁴¹⁴ How about the one that has grown 700% since 1980?⁴¹⁵

Even if this putative protected class is limited to native Appalachians and urban Appalachians,⁴¹⁶ how and where should the law draw the line? Can Appalachian transplants, people born elsewhere who moved to Appalachia, claim Appalachian protected status?⁴¹⁷

⁴¹⁰ See DAN ROONEY, *ALLEGHENY CITY: A HISTORY OF PITTSBURGH'S NORTH SIDE 108* (Univ. of Pitt. Press 2013) (citation omitted).

⁴¹¹ *Id.* at 107.

⁴¹² *Id.*

⁴¹³ Dan Majors, *Survey Says: Pittsburgh Is 19th Most Livable City and That's Pretty Good*, *PITT. POST-GAZETTE* (Apr. 4, 2017), <http://www.post-gazette.com/local/city/2017/04/04/most-livable-cities-us-livability-rankings-pittsburgh-100-best-places-to-live/stories/201704030159>.

⁴¹⁴ Ferrari & Rhee, *supra* note 11, at 890.

⁴¹⁵ *Id.*

⁴¹⁶ For further discussion, see *supra* Section IV.C.

⁴¹⁷ If nonnative transplants to Appalachia can subsequently claim Appalachian legal status, then should Rachel Dolezal be able to claim the protected legal status of a Black female even though she was born White? Decca Aitkenhead, *Rachel Dolezal: 'I'm Not Going to Stoop and Apologise and Grovel'*, *GUARDIAN* (Feb. 25, 2017, 4:00 AM), <https://www.theguardian.com/us-news/2017/feb/25/rachel-dolezal-not-going-stoop-apologise-grovel>. Dolezal became infamously known as a person who was born in Montana to White parents but decided later in life to self-identify as a Black person. *Id.* She was a well-known and respected "Black" civil rights activist, Branch President of the Spokane, Washington, National Association for the Advancement of Colored People (NAACP), chair of Spokane's police ombudsman commission, and Eastern Washington University teacher when a local TV news crew in 2015 confronted her about her White biological heritage on camera. *Id.*

The story quickly went viral. *Id.* Later it was discovered that Dolezal had once sued a university for discriminating against her because she was White. *Id.* In 2017, she was jobless and feeding her family on food stamps. *Id.* She had applied for over 100 jobs, but no one would hire her, even to stack grocery shelves. She claimed to be able to count the number of her remaining friends on her fingers. *Id.*

Dolezal explained, "The narrative was that I'd offended both communities in an unforgivable way, so anybody who gave me a dime would be contributing to wrong and oppression and bad things. To a liar and a fraud and a con." She seeks "to open up this dialogue about race and identity, and to just encourage people to be exactly who they are." *Id.*; see also RACHEL DOLEZAL, *IN FULL COLOR: FINDING MY PLACE IN A BLACK AND WHITE WORLD* (2017).

Because they are a minority group outside Appalachia often living in cities like Cincinnati with well-established hostility or discrimination against them,⁴¹⁸ urban Appalachians probably require the most legal protection. Yet what should their legal boundaries be? How should law measure genuine self-identification to Appalachia? Must an urban Appalachian be born in Appalachia? How many intervening generations is too many for a person born outside Appalachia to claim Appalachian identity? How can a non-native prove that she is “Appalachian” enough to merit legal protection? Do they have to fulfill Appalachian stereotypes or meet some oversimplified (but clear) checklist to be considered Appalachian for legal purposes? If they excel at hiding (or “covering”⁴¹⁹) their Appalachian identity and are less likely to suffer discrimination as a result, are they less deserving of legal protection? What if they rebel or renounce their Appalachian identity for a season? Are they legally protected then? How about if they subsequently return, prodigal like, to their Appalachian roots?

2. Unlike Race or Gender, Location Can Make a Substantive Difference in Housing, Employment, and Education

One of the moral arguments against traditional discrimination such as racism is the simple “colorblind rule” that “under any standards of morality or fairness one’s race ought to be legally irrelevant.”⁴²⁰ Setting aside ongoing debates about the accuracy or wisdom of colorblindness,⁴²¹ location is unavoidably relevant to fairness in basic human needs like housing, employment, and education.

The availability and feasibility of suitable housing most certainly varies by location.⁴²² One of the lasting criticisms of the “gentrification” of urban

⁴¹⁸ For a discussion of Ohio’s opinion of Appalachians, see *supra* notes 279–304, 313–316 and accompanying text; see also Phillip J. Obermiller, *Paving the Way: Urban Organizations and the Image of Appalachians*, in BACK TALK FROM APPALACHIA: CONFRONTING STEREOTYPES 251–264 (Dwight B. Billings, Gurney Norman, & Katherine Ledford eds., 1999).

⁴¹⁹ See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 771 (2002).

⁴²⁰ Ilhyung Lee, *Race Consciousness and Minority Scholars*, 33 CONN. L. REV. 535, 540 (2001) (citing T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1076 (1991)).

⁴²¹ See, e.g., Elise C. Boddie, *Critical Mass and the Paradox of Colorblind Individualism in Equal Protection*, 17 U. PA. J. CONST. L. 781 (2015) (summarizing debate).

⁴²² See generally ELLEN WILSON & ROBERT R. CALLIS, U.S. CENSUS BUREAU, CURRENT HOUSING REPORTS, WHO COULD AFFORD TO BUY A HOME IN 2009? AFFORDABILITY OF BUYING A HOME IN THE UNITED STATES (2013), https://www.census.gov/content/dam/census/library/publications/2013/demo/h121_13-02.pdf.

neighborhoods⁴²³ is that the rising costs that accompany gentrification cause the minority, lower income residents who used to live there to leave and subsequently keep minority, lower income residents out.⁴²⁴

As urban Appalachians have demonstrated,⁴²⁵ where you live obviously affects where you work.⁴²⁶ Americans are constantly moving because of jobs.⁴²⁷ Likewise, the cost of housing has increased the length of commutes from home to work.⁴²⁸ Although some jobs allow telecommuting through the internet, more companies are limiting teleworking and requiring employee physical presence at work.⁴²⁹

As so-called “white flight” from cities to the suburbs has demonstrated,⁴³⁰ where you live also affects your children’s educational opportunities. Federal courts have recognized that housing and school patterns feed on each other.⁴³¹

⁴²³ “Gentrification” is defined as the migration of affluent people into former working-class neighborhoods. Although scholars have long argued that gentrification may harm urban communities by displacing long-term residents, the research on any causal connection between affluent residents moving in and blue collar residents moving out is mixed. Isaac William Martin & Kevin Beck, *Gentrification, Property Tax Limitation, and Displacement*, 54 URB. AFF. REV. 33, 35 (2018).

⁴²⁴ *Id.* at 34.

⁴²⁵ For a discussion of the Great Migration of four million resident Appalachians in search of work outside Appalachia, see *supra* Section IV.C.3.

⁴²⁶ See generally Matthew Kahn, *Cities, Economic Development, and the Role of Place-Based Policies: Lessons for Appalachia*, in UNIVERSITY OF KENTUCKY CENTER FOR POVERTY RESEARCH DISCUSSION PAPER SERIES (2009), http://www.ukcpr.org/sites/www.ukcpr.org/files/documents/DP2009-12_0.pdf.

⁴²⁷ See DAVID IHRKE, U.S. CENSUS BUREAU, POPULATION CHARACTERISTICS, REASON FOR MOVING: 2012 TO 2013 (2014), <https://www.census.gov/content/dam/census/library/publications/2014/demo/p20-574.pdf>.

⁴²⁸ See Thomas Blake, *Commuting Costs and Geographic Sorting in the Housing Market*, 44 REAL EST. ECON. 1 (2016)

⁴²⁹ See Rebecca Greenfield, *The Rise and Fall of Working From Home: The Permanent Telecommuter Is Going Extinct*, BLOOMBERG (July 10, 2017, 12:44 PM), <https://www.bloomberg.com/news/articles/2017-07-10/the-rise-and-fall-of-working-from-home>.

⁴³⁰ “White flight” is defined as “the departure of whites from places (such as urban neighborhoods or schools) increasingly or predominantly populated by minorities.” *White flight*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/white%20flight> (last visited Nov. 11, 2018). See generally John R. Logan, Zhang Weiwei, & Deirdre Oakley, *Court Orders, White Flight, and School District Segregation, 1970-2010*, 95 SOC. FORCES 1049, 1075 (2017).

⁴³¹ Joseph R. McKinney, *The Courts and White Flight: Is Segregation or Desegregation the Culprit?*, 110 ED. L. REP. 915, 915 (1996) (citing *Freeman v. Pitts*, 503 U.S. 467 (1992); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973); *United States v. Bd. of Sch. Comm’rs of Indianapolis*, 573 F.2d 400 (7th Cir. 1978); *Hart v. Cmty.*

From an antidiscrimination standpoint, what makes the complex relationship between location and housing, employment, and educational opportunity especially challenging is the fact that Americans everyday legally choose to discriminate on the basis of location for innocuous housing, employment, or educational reasons. We choose to live in a certain neighborhood to attend a particular school. We must leave our current school and sell our current home because a working parent has obtained a new job in a different locale. With the increased income from a new job, we move to a better home, a better neighborhood, and a better school.

3. Unlike Race or Gender, Location Can Convey Demographic Truths and Useful Empirical Data.

Unlike other protected classes like race or gender, the geographic location of your home can convey more useful and accurate information about you and your neighborhood.⁴³² Because the geographic perspective by definition scales every place and space,⁴³³ when we zoom out and away from individual homes, past neighborhoods and hometowns, the big picture that emerges is of the homeland. The first Office of Homeland Security Director Tom Ridge said, “when the hometown is secure, the homeland is secure.”⁴³⁴

V. HOMELAND INSECURITY⁴³⁵

The very term “homeland” has long promoted patriotism and nationalism by evoking family imagery in service of the state.⁴³⁶ Perhaps most

Sch. Bd. of Educ., 512 F.2d 37 (2d Cir. 1975); NAACP v. Lansing Bd. of Educ., 559 F.2d 1042 (6th Cir. 1977)).

⁴³² For further discussion, see *supra* Section III.E.3. See generally *Census Data: Census Data by Zip Code*, DARTMOUTH LIBR. RES. GUIDES, <https://researchguides.dartmouth.edu/census/ZIP> (last visited Dec. 16, 2018) (listing online websites to find U.S. Census data by zip code or equivalent). See also *Data Reports: Socioeconomic Data Profile by County*, APPALACHIAN REG’L COMM’N, <https://www.arc.gov/research/DataReports.asp> (last visited Oct. 29, 2018).

⁴³³ See Sallie A. Marston, *A Long Way from Home: Domesticating the Social Production of Scale*, in *SCALE AND GEOGRAPHIC INQUIRY: NATURE, SOCIETY AND METHOD* 172 (E. Shepherd & R. McMaster eds., 2008).

⁴³⁴ Elizabeth Becker, *Washington Talk; Prickly Roots of ‘Homeland Security,’* N.Y. TIMES (Aug. 31, 2002), <https://www.nytimes.com/2002/08/31/us/washington-talk-prickly-roots-of-homeland-security.html>.

⁴³⁵ *Accord* BLUNT & DOWLING, *supra* note 17, at 167 (utilizing “homeland (in)security”).

⁴³⁶ See Anne McClintock, *Family Feuds: Gender, Nationalism and the Family*, 44 FEMINIST REV. 61, 63 (1993) (describing the “iconography of familial and domestic space” used to depict a nation as a homeland). Deborah Cowen considers such nationalistic family imagery as seeking to legitimize “the production and reproduction of domination and exploitation.” Deborah Cowen,

infamously, the German Nazi Party abused the idealized feminine concept of Homeland (*Heimat*) and the masculine concept of a German Fatherland to further its insecure aspirations of a master Aryan race.⁴³⁷ Under the evil Apartheid system, the dominant but insecure White minority Afrikaners in South Africa created isolated Black ghettos for the legally inferior Black majority South Africans called homelands (*bantustans*).⁴³⁸ After the fall of Apartheid and the Black majority's accompanying political empowerment, select White minority Afrikaners have ironically sought to create a new, independent *bantustan* just for Whites.⁴³⁹ In response to the September 11, 2001, terrorist attacks against the United States, what eventually became the U.S. Department of Homeland Security immediately embraced the label "homeland,"⁴⁴⁰ a term that until then had been largely foreign and unfamiliar to Americans.⁴⁴¹

To avoid insecure geographic discrimination, this Essay advocates proscribing individual locational prejudice regardless of protected class or other historical limitations of U.S. civil rights doctrine; and utilizing human capabilities and geographic limits to cabin both intersectionality and pretextual discrimination while promoting constructive compromise. Only then can everyone's homeland truly be secure.

A. *A Protected Class Limited to Locational Prejudice*

Freedom from locational prejudice in U.S. law currently remains a right without a remedy.⁴⁴² This Essay simply argues that anyone who intentionally discriminates against another person because of locational prejudice—even when factually mistaken about the victim's identity⁴⁴³—should be held legally accountable. The evil underlying locational prejudice, the stereotyping sampling error,⁴⁴⁴ is the same evil underlying racism, sexism, sexual orientation prejudice,

From the American Lebenstraum to the American Living Room: Class, Sexuality, and the Scaled Production of "Domestic" Intimacy, 22 ENV'T AND PLAN. D: SOC'Y AND SPACE 755, 762 (2004).

⁴³⁷ See BLUNT & DOWLING, *supra* note 17, at 160.

⁴³⁸ *Id.*

⁴³⁹ *Id.* at 160–61.

⁴⁴⁰ According to its own official history, the Office of Homeland Security was created 11 days after the 9/11 attacks. See *Creation of Department of Homeland Security*, U.S. DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/creation-department-homeland-security> (last visited Oct. 29, 2018).

⁴⁴¹ See Amy Kaplan, *Homeland Insecurities: Reflections on Language and Space*, 85 RADICAL HIST. REV. 82, 85 (2003) ("Why not *domestic security*? *Civil defense*? *National security*? How many Americans, even at moments of fervent nationalism, think of America as a homeland?") (emphasis in original).

⁴⁴² See *supra* Section IV.D.

⁴⁴³ Cf. Senn, *supra* note 283 and accompanying text.

⁴⁴⁴ See *supra* note 94 and accompanying text.

and religious discrimination.⁴⁴⁵ The perpetrator marginalizes the victim by relying on irrational negative assumptions about the victim's identity. In our view, the stereotyping sampling error alone—subject to fair and rigorous proof requirements⁴⁴⁶—should be sufficient to proscribe such pernicious conduct. Ultimately, the stereotyping sampling error hurts everyone by using flawed reasoning⁴⁴⁷ to distribute societal benefits or burdens unfairly.

Existing limitations to U.S. civil rights doctrine to include the state action,⁴⁴⁸ tiers of scrutiny,⁴⁴⁹ and protected class⁴⁵⁰ requirements have been persuasively criticized as historical anachronisms.⁴⁵¹ Notwithstanding our agreement with such criticism, the easiest way to proscribe geographic discrimination in U.S. civil rights law right now would be to allow domestic geographic subgroups like Appalachians to become protected classes.⁴⁵² In particular, an Appalachian discrimination lawsuit might arguably establish state action with the remarkable official admissions of discrimination from PARC⁴⁵³ and other government actors.⁴⁵⁴

The biggest drawback of a locational prejudice protected class in our view would be the continued intractability of the intersectionality problem.⁴⁵⁵ Geographic identity—by being inherently physical, provable, circumstantial, and intersectional—can provide useful limits on intersectionality.

⁴⁴⁵ See *supra* notes 95–101 and accompanying text.

⁴⁴⁶ Locational prejudice should be subject to rigorous intent proof requirements comparable to the proof of racial animus. See *Washington v. Davis*, 426 U.S. 229 (1976). See generally KUSHNER, *supra* note 48, at § 3.II.B (“Proof of Intent”).

⁴⁴⁷ See *supra* note 101 and accompanying text.

⁴⁴⁸ See, e.g., Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69 (1967); William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

⁴⁴⁹ See KUSHNER, *supra* note 48, at § 4:26 (“A four-tier model: a rationality plus tier requiring interests articulated by the state or assumed by the court—toward substantive equal protection”).

⁴⁵⁰ See *Diaz*, *supra* note 327; *Walker*, *supra* note 207.

⁴⁵¹ See, e.g., John Marquez Lundin, *Making Equal Protection Analysis Make Sense*, 49 SYRACUSE L. REV. 1191 (1999) (collecting criticism).

⁴⁵² See *supra* Section IV.D.

⁴⁵³ See *supra* Section IV.D.3.

⁴⁵⁴ See *id.*

⁴⁵⁵ For further discussion, see *supra* Section V.A.

B. *Geographic Limits to Intersectionality*

When viewed systemically or collectively, intersectionality can lead to nihilism.⁴⁵⁶ We are all unique individuals and want to be viewed and treated as such, but law simply lacks the tools and resources always to evaluate us as idiosyncratic individuals.

Law therefore unavoidably must rely upon imperfect rules that group individuals into different categories. Although intersectionality provides a powerful critique of oversimplified (and thus unfair) legal rules,⁴⁵⁷ anyone can point out that they possess additional identities (intersecting categories) not captured by existing legal rules.

For example, assume there are two White men named John and Jack. While the law might only see two White men, John points out that he is a self-made Appalachian descended from a poor single mother while Jack inherited great wealth from his rich Long Island, New York, family. Although these socioeconomic status and family inheritance categories are extremely important, even foundational, to John's personal identity, they are largely irrelevant to U.S. civil rights law.⁴⁵⁸

One way to avoid absurd results is to prioritize intersecting identities that law historically unjustly marginalized over intersecting identities that law historically privileged or ignored. Under this approach, a Black woman's intersectionality should receive closer scrutiny than a White man's intersectionality solely because of the proven, historical legacy of government-sponsored discrimination against Blacks⁴⁵⁹ and women.⁴⁶⁰

But closer scrutiny does not mean reverse discrimination. All law is context specific. Antidiscrimination law requires a deep analysis of the specific factual context.⁴⁶¹ The capabilities approach⁴⁶² combined with the geographic perspective provide a deep factual context through which to explore intersecting identities constructively.

⁴⁵⁶ See, e.g., Anis Shivani, *Time to Give Up on Identity Politics: It's Dragging the Progressive Agenda Down*, SALON (Sept. 2, 2017, 11:00 AM), <https://www.salon.com/2017/09/02/time-to-give-up-on-identity-politics-its-dragging-the-progressive-agenda-down/> (stating that "intersectionality" and other identity theories were "nihilistic").

⁴⁵⁷ See *supra* Section III.A.

⁴⁵⁸ See KUSHNER, *supra* note 48, at §§ 8:5 ("Wealth"), 9:5 ("Other Classifications") (stating that the U.S. Supreme Court has refused to scrutinize wealth, close relative, or college legacy preference application classifications).

⁴⁵⁹ See *generally id.* at § 5:2 ("Race") (collecting cases).

⁴⁶⁰ See *generally id.* at § 7:1 ("Gender") (collecting cases).

⁴⁶¹ See, e.g., Deborah M. Weiss, *The Impossibility of Agnostic Discrimination Law*, 2011 UTAH L. REV. 1677, 1678 (2011) (stating that "[f]indings of case-specific facts are generally treated with great deference").

⁴⁶² See *supra* Section II.

How would this geographic capability-based inquiry work? While this process requires much further research and reflection, we offer an initial framework for discussion:

- (1) the plaintiff should specifically allege:
 - (a) which identity or identities the defendant discriminated against;
 - (b) the specific geographic locations (*place* and *space*) where the plaintiff daily creates, experiences, or nurtures that identity or those identities from her *home*;
 - (c) which of her specific, legally recognized capabilities were impaired by such discrimination;
 - (d) the *place* or *places* where the alleged discrimination occurred; and
 - (e) how the defendant caused the impairment of the plaintiff's capability or capabilities by literally or figuratively creating *distance*, ensuring that *distance* is quantified through an objective standard.
- (2) the defendant should respond to the plaintiff's discrimination claims; and
- (3) the legal decision maker should utilize time-sensitive maps, geographic statistics, and GIS along with more traditional discovery to find the relevant facts with which to evaluate the individualized discrimination claims against particular capabilities in a specific geographic context.

As an example, we shall compare how *Bronson v. Board of Education of the City School District of Cincinnati* was decided under established U.S. civil rights law with this alternative approach.⁴⁶³

1. The Plaintiff Should Specifically Allege Impacted Identity, Impaired Capability, and Distance

While a plaintiff has the freedom to define her identity against which the defendant allegedly discriminated, the plaintiff must back her defined identity up with specific capabilities the defendant ostensibly impaired because of identity discrimination. In the *Bronson* lawsuit, Black and Appalachian parents and students⁴⁶⁴ sought a preliminary and permanent injunction against the Board of

⁴⁶³ *Bronson v. Bd. of Educ.*, 550 F. Supp. 941 (S.D. Ohio 1982). For the previous discussion of *Bronson*, see *supra* notes 311–319 and accompanying text.

⁴⁶⁴ The district court defined the Appalachian Plaintiffs as native and urban Appalachians. *Bronson*, 550 F. Supp. at 946. For definitions of native and urban Appalachians, see *supra* Section IV.C.1, 3.

the Cincinnati Public School District to stop the planned closure of the Peaslee Primary School (grades K-3)⁴⁶⁵ in the Over-the-Rhine neighborhood of Cincinnati, Ohio, under 42 U.S.C. § 1983,⁴⁶⁶ the Equal Protection Clause of the 14th Amendment,⁴⁶⁷ and Title VI of the Civil Rights Act of 1964.⁴⁶⁸

These U.S. civil rights laws severely limited the Appalachian Plaintiffs from defining their impacted identity in three ways. Specifically, the district court (1) refused to recognize Appalachians as a protected class; (2) never addressed the possibility of treating Black Appalachians (“Affrilachians”⁴⁶⁹) as an intersectional protected class; and (3) assumed the necessity of racial/national origin balancing,⁴⁷⁰ where the Peaslee School’s racial/national origin student enrollment percentage must exceed the School District’s overall enrollment racial/national origin average percentage to be actionable under U.S. civil rights law.⁴⁷¹ A more flexible geographic approach would not have been subject to these three limitations.

First, as previously discussed,⁴⁷² the district court held that the Appalachian Plaintiffs lacked standing to bring the lawsuit because Appalachians are not a protected class under Title VI of the Civil Rights Act.⁴⁷³ The geographic approach would have avoided such inflexible and arbitrary line drawing and allowed Appalachians legal protection from discrimination.

⁴⁶⁵ *Bronson*, 550 F. Supp. at 950.

⁴⁶⁶ 42 U.S.C. § 1983 (2018).

⁴⁶⁷ U.S. CONST. amend. XIV.

⁴⁶⁸ 42 U.S.C. §§ 2000d *et seq.* (2018). *See Bronson*, 550 F. Supp. at 944.

⁴⁶⁹ Poet Frank X. Walker originally coined the term “Affrilachian.” *See THE AFFRILACHIAN POETS*, <http://www.theaffrilachianpoets.com> (last visited Oct. 29, 2018).

⁴⁷⁰ *See* Jonathan Fischbach, Will Rhee, & Robert Cacace, *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. REV. 491, 502, 504 (2008).

⁴⁷¹ *Bronson*, 550 F. Supp. at 950 n.4. With school desegregation, racial balancing can be used to eliminate racially identifiable schools:

Fundamentally a desegregation plan must eliminate racial identifiability of schools When a history of segregation . . . forces the court to fashion a remedy, it is within the equitable authority of the court to use racial ratios as a starting point in formulating a remedy Of course, no uniform degree of racial mixing of students is or could be required in order to end segregated schools and counter the pervasive effects of years of segregatory practices But awareness of the racial composition of the system as a whole provides a reference for determining what are racially identifiable schools within that system. The test of identifiability then becomes the substantial disproportion in composition compared to the racial composition of the school system.

Morgan v. Kerrigan, 401 F. Supp. 216, 232 (D. Mass. 1975) (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24–26 (1971)).

⁴⁷² *See supra* Section IV.D.1 for an earlier discussion of *Bronson*.

⁴⁷³ *Bronson*, 550 F. Supp. at 959–60.

Second, the district court opinion ignored the possibility that some of the majority Black students at Peaslee might have self-identified as Appalachian as well.⁴⁷⁴ Although the published opinion is unsurprisingly silent about this intersectional possibility, because Peaslee's Over-the-Rhine neighborhood had well-established Black and Appalachian communities at the time, such intersectional students were nevertheless possible.⁴⁷⁵ Like a young Tiger Woods, parents and students of Affrilachian or other identities intersecting with Appalachian identity may have been forced to limit their identity to claim protected class status.⁴⁷⁶

Third, because the geographic approach treats plaintiffs (or alleged victims) as individuals, it eschews the need for crude aggregate identity statistical measures of disparate impact,⁴⁷⁷ critical mass,⁴⁷⁸ racial predominance,⁴⁷⁹ or other forms of racial or national origin balancing.⁴⁸⁰ Although such aggregate measures still provide useful starting points for analysis,⁴⁸¹ the geographic approach allows for a more nuanced inquiry.

⁴⁷⁴ The opinion is silent about whether the Black and Appalachian student percentages therein are separate or overlapping. This possible confusion might have been caused by the Plaintiffs' own data. The Court admitted all of the Plaintiffs' Exhibits into evidence. *Bronson*, 550 F. Supp. at 945 n.1. The Court found that Peaslee was 81.9% Black in 1981–1982 and 3.97% Appalachian in 1973. *Id.* at 946. One of the Plaintiffs' exhibits, which was not properly authenticated and thereby excluded, apparently estimated Peaslee as approximately 15% Appalachian in 1973. *Id.* The district court judge explained that the 15% Appalachian figure would not have changed his ruling. *Id.* at 950 n.4. The districtwide percentage of Appalachian students in 1973 was estimated by the District as 17.27% and by the Plaintiffs as approximately 32%. *Id.*

⁴⁷⁵ For a discussion of the history of urban Appalachians in the Over-the-Rhine neighborhood, see ZANE L. MILLER & BRUCE TUCKER, CHANGING PLANS FOR AMERICA'S INNER CITIES: CINCINNATI'S OVER-THE-RHINE AND TWENTIETH-CENTURY URBANISM xviii, 46, 59, 61–66, 71–82, 91 (1998). For example, in 1944, six pastors from the West End of the Over-the-Rhine neighborhood issued a joint statement urging their apparently White, non-Appalachian congregations to practice a “neighborliness toward both . . . mountaineer and Negro neighbors.” *Id.* at 62 (citation and internal quotation marks omitted). There were even multiple efforts in the late 1960s to define Over-the-Rhine as an official Appalachian cultural enclave. *Id.* at 71–72.

Two *Bronson* Plaintiff parents believed that the Peaslee School was so important to Over-the-Rhine that they purchased the School in 1984, two years after its closure, and created the Peaslee Neighborhood Center with “an educational philosophy that encourages participatory learning and draws on the lived experience of the participants.” *History, PEASLEE NEIGHBORHOOD CTR.*, <http://peasleecenter.org/history/about/> (last visited Nov. 29, 2018). Today, the Peaslee Neighborhood Center seeks to “empower[] folks to claim their beauty, strength, and voices.” *Id.*

⁴⁷⁶ For a discussion of Tiger Woods' multiracial identity, see *supra* Section III.A.

⁴⁷⁷ See KUSHNER, *supra* note 48, at § 3:9 (“Disproportionate Impact”) (collecting cases).

⁴⁷⁸ See *id.* at § 1:5 (“Overview and Models of Equal Protection”) (discussing the “critical mass” concept in *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

⁴⁷⁹ See, e.g., *Morgan v. Kerrigan*, 401 F. Supp. 216, 232 (D. Mass. 1975).

⁴⁸⁰ See Fischbach et al., *supra* note 470, at 502, 504.

⁴⁸¹ See, e.g., *Morgan*, 401 F. Supp. at 232.

For example, if the Cincinnati School District hypothetically decided to discriminate against only Affrilachian students but not Black students or White Appalachian students at Peaslee, this geographic approach would allow Affrilachian plaintiffs to bring a discrimination case against the District even if the percentage of Affrilachian students at Peaslee was less than the districtwide averages for Affrilachian students, Black students, or White Appalachian students.

Under our proposed geographic framework, the Appalachian Plaintiffs could have pleaded an urban Appalachian identity⁴⁸² (to include Affrilachian identity) and deprivation of their central capacity of an adequate education.⁴⁸³ The place of this alleged deprivation was the Peaslee Primary School; specifically, its closing.

To establish educational or literal distance, the Plaintiffs could have utilized either (1) objective educational quality data (and accompanying educational expert witness analysis) to demonstrate how closing Peaslee would have rendered the Plaintiffs' children's education inadequate, or (2) objective mapping data of the individual Plaintiff families' day-to-day home, work, and school locations; routes; and routines to illustrate how closing Peaslee would have increased the Plaintiffs' commuting time or distance to access an adequate education.

As explained below, however, *Bronson's* factual findings appeared to preclude the Plaintiffs from making an objective distance argument. Consequently, the District probably would have been able to refute the Plaintiffs' geographic claims.

2. The Defendant Should Respond to Each Specific Allegation

Geographic discrimination's more individualized approach would also allow the defendant to respond to each specific allegation in a more individualized manner. Treating the plaintiff as an individual in her daily place, space, and distance context provides a defendant with more tailored ways of specifically rebutting discrimination claims. The *Bronson* opinion notably lacks this level of detail.

Under the flawed but familiar burden-shifting framework,⁴⁸⁴ if the defendant articulates a legitimate, non-discriminatory reason for the plaintiff's

⁴⁸² For a discussion of the definition of urban Appalachians, see *supra* Section IV.C.3.

⁴⁸³ See *supra* Section II.B.3; NUSSBAUM, *supra* note 29, at 34.

⁴⁸⁴ See, e.g., Stacy Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession*, 83 *FORDHAM L. REV.* 2457, 2462 (2015) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

claimed discrimination, then the burden of production would shift back to the plaintiff to demonstrate that the defendant's reasons are actually pretextual.⁴⁸⁵

In *Bronson*, assuming the veracity of the district court's factual findings, the Cincinnati Public School District probably would have been able to respond adequately even to geographic discrimination allegations. The District's claims that the school closings were unavoidably necessary because of a budget crisis were unrebutted by the Plaintiffs.⁴⁸⁶ In fact, obtaining state loans because of the District's budget crisis would have required Peaslee's closure anyway because Peaslee did not conform to the state rule of containing at least 15 classes.⁴⁸⁷

Even before its closure, Peaslee was not a high performing school. Assuming that Peaslee was identifiable as an Appalachian school, its achievement scores ranked 18th-24th out of the 25 so-called Appalachian schools in the District.⁴⁸⁸ Closing Peaslee therefore did not deprive Appalachian students of a high performing Appalachian school.

Neither would closing Peaslee subject former Peaslee students to worse facilities, worse academic programs, or a substantially longer commute. The two elementary schools where former Peaslee students would attend also had better facilities and comparable academic programs.⁴⁸⁹ The replacement schools were only three and six blocks away from Peaslee.⁴⁹⁰ The district court concluded that the Plaintiffs had "utterly failed to prove any distinction" between the educational programs at Peaslee and its replacement school or "to establish that any harm will be caused" by the student transfer.⁴⁹¹ The *Bronson* Plaintiffs therefore probably would have had difficulty establishing distance under our geographic approach.

Finally, the Plaintiffs "failed to explain in precisely what manner the family or neighborhood structure, and religion of Appalachians differ from those of any other group."⁴⁹² They "conceded that Appalachians share a national origin common with American citizens generally."⁴⁹³ Even the Plaintiffs did not classify Peaslee as a "heavily" or "predominantly" Appalachian school.⁴⁹⁴ Although our geographic approach allows a plaintiff to plead an intersectional identity, any plaintiff of course still must explain not only how their

⁴⁸⁵ *See id.*

⁴⁸⁶ *Bronson v. Bd. of Educ.*, 550 F. Supp. 941, 949–50, 952 (S.D. Ohio 1982).

⁴⁸⁷ *Id.* at 949.

⁴⁸⁸ *Id.* at 950 n.4.

⁴⁸⁹ *Id.* at 947, 950.

⁴⁹⁰ *Id.* at 947.

⁴⁹¹ *Id.* at 950 n.4.

⁴⁹² *Id.* at 946 n.3.

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* at 952–53.

intersectional identity makes them different from any other group but also how the alleged geographic discrimination is related to that intersectional identity.

3. The Court Should Evaluate Each Discrimination Claim in Geographic Context

Perhaps the greatest benefit of the geographic approach is the amount of objective contextual information available to the parties and the court. Instead of relying on the adversarial process or the “battle of the experts” where often the side with the best (usually more expensive) expert witness wins,⁴⁹⁵ a court can use the rich publically available geographic data⁴⁹⁶ to scrutinize the fit between the plaintiff’s discrimination claims and alleged impacted capacities.

Under this Essay’s approach, a plaintiff should be required to submit an *actual map* of the relevant place (including, if physical, her home), space, and, if physical, alleged distance underlying her geographic discrimination claim. The map should also contain—or at least allege on information or belief⁴⁹⁷—the objectively verifiable distance required for geographic discrimination. A court’s local rules could require it as part of the pre-trial order and hearing.⁴⁹⁸ With the ready availability of mapping technology,⁴⁹⁹ such a map should be relatively easy and inexpensive for a plaintiff to create. More importantly, such required maps would not only narrow the case’s scope but also would invaluablely contextualize the case with concrete facts, locations, and routines.⁵⁰⁰

Like many other school desegregation cases,⁵⁰¹ *Bronson* employed geographic data, maps, and expert testimony.⁵⁰² As the gatekeeper of the admissibility of evidence, the trial court should rigorously evaluate all

⁴⁹⁵ See, e.g., JOHN D. NORTH, 8 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 86:58 (4th ed. 2017) (“Expert testimony—‘Battle of the experts’”).

⁴⁹⁶ For a discussion of the types of publically available geographic data, see *supra* Section III.C-E.

⁴⁹⁷ See, e.g., FED. R. CIV. P. 8(b)(5), 11(b)(3).

⁴⁹⁸ See generally FED. R. CIV. P. 16 (describing federal civil pre-trial orders), 83 (authorizing local U.S. district court rules).

⁴⁹⁹ For a discussion of publically accessible mapping technology, see *supra* Section II.E.

⁵⁰⁰ For a discussion of how GIS can improve analysis by revealing social patterns otherwise not readily noticeable, see *id.*

⁵⁰¹ See, e.g., Deenesh Sohoni & Salvatore Saporito, *Mapping School Segregation: Using GIS to Explore Racial Segregation between Schools and Their Corresponding Attendance Areas*, 115 AM. J. EDUC. 569 (2009). See generally *K-12 Integration, Desegregation, and Segregation Archive*, U.N.C. CHARLOTTE: DIVERSITY IN EDUC., https://k16diversity.uncc.edu/?sfid=1721&_sft_archive=k-12-diversity (last visited Nov. 11, 2018) (collecting citations).

⁵⁰² *Bronson v. Bd. of Educ.*, 550 F. Supp. 941, 945–52 (S.D. Ohio 1982).

geographic data, maps, and expert testimony for reliability.⁵⁰³ The *Bronson* Court rejected the Plaintiffs' expert testimony from Dr. Michael Maloney, a former city planner and Director of the Urban Appalachian Council.⁵⁰⁴

Although Maloney is clearly an unabashed advocate for Appalachians in Cincinnati,⁵⁰⁵ his own measures for determining Appalachian neighborhoods in Cincinnati demonstrate how difficult it can be to aggregate self-defining identity categories like Appalachians⁵⁰⁶ into collective statistics. Since 1986, Maloney and his collaborators have used a set of criteria (periodically revised and updated) that they admit ironically rely upon the stereotyping sampling error⁵⁰⁷ to determine poor Appalachian neighborhoods. They acknowledge that

[t]he term Appalachian is not synonymous with poverty. The vast majority of Appalachians in the [Cincinnati] metropolitan areas are not poor, not on welfare, and are not high school dropouts. Most own their homes and have relatively stable families. They are a predominantly blue collar group. About 10 percent hold managerial and professional jobs,⁵⁰⁸

and that their statistics exclude Affilachians⁵⁰⁹ and "higher status Appalachians,"⁵¹⁰ but nevertheless employ six "Criteria for Classifying Neighborhoods as Appalachian" that rely upon negative Appalachian stereotypes.⁵¹¹

In response to the argument that they were making the stereotyping sampling error, Maloney and Auffrey "acknowledge the circular reasoning involved in using these negative criteria to define Appalachian neighborhoods. We can say minimally that Cincinnati's Appalachian leaders concur that these

⁵⁰³ See, e.g., FED. R. EVID. 103–105, 702.

⁵⁰⁴ *Bronson*, 550 F. Supp. at 945 n.1.

⁵⁰⁵ See *Mike Maloney*, *supra* note 345, at 175.

⁵⁰⁶ For a discussion of how difficult it can be to define Appalachians, see *supra* Section IV.C.

⁵⁰⁷ See *supra* note 11 and accompanying text.

⁵⁰⁸ Maloney & Auffrey, *supra* note 316, at 51.

⁵⁰⁹ Because Affrilachians "tend to blend into the larger African American community," they are "not identifiable" through Maloney's analysis. *Id.*

⁵¹⁰ Maloney hypothesized that "higher status Appalachians do not concentrate in ethnic enclaves" and thus would not live in so-called Appalachian neighborhoods. *Id.*

⁵¹¹ These six criteria are: (1) greater than 23% of the families are below the poverty level; (2) less than 41.0% of families are African American; (3) less than 80% of the persons 25 years or older are high school graduates; (4) more than 7% of the persons 16-19 years old who are not in school are not high school graduates; (5) more than 62% of the persons 16-19 years old are jobless (includes those unemployed and those not in the civilian labor force); and (6) more than 3 persons per average family. *Id.* at 53 & tbl. 5A. On their face, these criteria appear to perpetuate stereotypes that Appalachians are (1) poor; (2) White; (3) high school dropouts; (4) unemployed; and (5) responsible for more children than they can handle.

are Cincinnati neighborhoods with high percentages of people with Appalachian origin.”⁵¹²

Such apparently unavoidable “we-know-it-when-we-see-it” tautologies highlight the general need to scrutinize geographic data closely and the specific need to scrutinize the individual geographic reality (for example, space, place, and distance) of a plaintiff who claims a complex intersectional self-identity about which it would be difficult if not impossible to obtain aggregate data.

C. *Exposing Pretextual Discrimination, Encouraging Concrete Compromise*

Finally, because pretextual discriminators operate much like the geographic capability-based inquiry above, this approach would also help prevent pretextual discrimination and encourage workable compromise. Pretextual discrimination is most common in the employment discrimination context where an employer can, among other actions, (1) fail to follow its own policies; (2) treat similarly situated employees in a disparate way; or (3) change its explanation for an employment decision.⁵¹³

Pretextual discrimination, however, need not be limited to the employment context. It is simply illegal intentional discrimination masquerading under seemingly legitimate, nondiscriminatory reasons.⁵¹⁴ If an organization or a state actor wanted to discriminate intentionally on a larger scale against a particular identity group, the discriminator could use that identity group’s practical geographic reach to discriminate pretextually against the group. Seemingly facially neutral measures, when employed within a particular group’s specific geographic context, can have the same effect as intentional discrimination.

For example, voting discrimination has a long history of seemingly race-neutral measures like writing tests and poll taxes being employed to discriminate

⁵¹² *Id.* at 53.

⁵¹³ *See, e.g.,* *Edwards v. Hiland Roberts Dairy, Co.*, 860 F.3d 1121, 1125–27 (8th Cir. 2017). More generally, a plaintiff can show that a defendant’s allegedly nondiscriminatory reason for the plaintiff’s adverse treatment is pretextual by arguing that the defendant’s reason (1) had no basis in fact; (2) was not the real reason for the defendant’s actions; or (3) was insufficient motivation for the defendant’s action. *See* IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, 4 STATE & LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 9.18 (“Intentional Discrimination—Plaintiff’s Reply Burden—Pretext”) (2018). *See also generally* *Empl. Prac. Guide* ¶ 618.762 (C.C.H. 2018) (“National Origin Discrimination: Pretext”) (collecting cases); Donald S. Rothschild & Brian M. Dougherty, *Proving Discrimination Circumstantially through Evidence of Pretext*, 27 DUPAGE CTY. B. ASS’N (2014–2015), <https://www.dcba.org/mpage/vol270515art2> (collecting cases).

⁵¹⁴ For a definition of pretextual discrimination, see *supra* note 2 and accompanying text.

intentionally against Blacks trying to vote.⁵¹⁵ Recent criticism of state voting districts gerrymandered along racial lines echo this concern that ostensibly race-neutral measures continue to promote pretextual discrimination.⁵¹⁶

Pretextual discrimination and interest-based negotiation⁵¹⁷ fortunately share much in common. While pretextual discrimination closely scrutinizes individual parties' interests and capabilities to find seemingly unobjectionable ways to discriminate intentionally, an interest-based negotiation seeks the converse. Starting with an intractable conflict like allegations of pretextual discrimination, the negotiation closely scrutinizes individual parties' interests and capabilities to forge an unobjectionable compromise. Both processes rely upon finding hidden alternatives among daily details and geographic realities.

VI. CONCLUSION: GOING HOME

As Charles Dickens wrote in *The Life and Adventures of Martin Chuzzlewit*, "And though home is a name, a word, it is a strong one; stronger than magician ever spoke, or spirit answered to, in strongest conjuration."⁵¹⁸ Notwithstanding its strength, "home" paradoxically may also be the double-edged sword perpetuating discrimination. In *Letter to My Daughter*, Maya Angelou defined home as "a place" inside ourselves "where we belong and maybe the only place we really do."⁵¹⁹ Angelou recognized that true freedom required liberation from the insecure, exclusionary notion of home itself, explaining that "[y]ou only are free when you realize you belong no place—you belong every place—no place at all."⁵²⁰

"Home" by definition requires keeping unwelcome others outside its borders.⁵²¹ As both a place and a space, home presents an insecure win-lose zero-

⁵¹⁵ See, e.g., E. Earl Parson & Monique McLaughlin, *The Persistence of Racial Bias in Voting: Voter Id, the New Battleground for Pretextual Race Neutrality*, 8 J. L. SOC'Y 75, 76 (2007).

⁵¹⁶ See, e.g., Note, *Alabama Legislative Black Caucus v. Alabama*, 129 HARV. L. REV. 281 (2015), <https://harvardlawreview.org/2015/11/alabama-legislative-black-caucus-v-alabama/>.

⁵¹⁷ See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 40–56, 97–106 (Bruce Patton ed., 2d ed. 1991) (defining interest-based negotiation).

⁵¹⁸ CHARLES DICKENS, *THE LIFE AND ADVENTURES OF MARTIN CHUZZLEWIT* 766 (London Electric Book Co. 2001) (available in ProQuest Ebook Central).

⁵¹⁹ MAYA ANGELOU, *LETTER TO MY DAUGHTER* 76 (2008).

⁵²⁰ Maria Popova, *Maya Angelou on Freedom: A 1973 Conversation with Bill Moyers*, BRAIN PICKINGS, <https://www.brainpickings.org/2013/06/14/maya-angelou-bill-moyers-1973/> (last visited Nov. 1, 2018).

⁵²¹ For example, "'not being home' is a matter of realizing that home was an illusion of coherence and safety based on the exclusion of specific histories of oppression and resistance, the repression of differences, even within oneself." Minnie Bruce Pratt, *Identity: Skin Blood Heart*, in

sum game. Unless we include and accept you as one of us, our home can only exist by physically and symbolically excluding others. We must protect the homeland by keeping the barbarians outside the gates. As the Greek poet C.P. Cavafy observed in *Waiting for Barbarians*, fear of nonexistent outsider barbarians invading the homeland can be abused as “a kind of solution.”⁵²² The protracted absence of outside visitors (visitors who have overstayed their welcome) is what ultimately makes a “home” a home.⁵²³

Everyone can be “at home” right now only if we stop using division of and difference from others to determine our own identity. Instead, share place and space. Welcome everyone to consider our home their home. Like the consolidation of two previously rival high schools into one,⁵²⁴ we can reframe home and away to become a broader home.

One can be genuinely proud of one’s own individual identity but not at the expense of other people’s identities. If identities differ, as they are bound to do, the differing parties can agree to disagree while maintaining security in their own distinctive self-identity.

For example, deeply religious people morally opposed to same-sex marriage can agree to disagree, secure enough in their own identity to avoid seeking to use law to bludgeon the other side into involuntary submission.⁵²⁵ Patriotic White Americans who support law enforcement can agree to disagree with Black Lives Matter advocates over the unprovable assumption whether or not the U.S. law enforcement system is racist⁵²⁶ while working together to

YOURS IN STRUGGLE: THREE FEMINIST PERSPECTIVES ON ANTI-SEMITISM AND RACISM 195–96 (E. Burkin et al. eds., 1984).

⁵²² C.P. Cavafy, *Waiting for the Barbarians*, in C.P. CAVAFY: COLLECTED POEMS (Edmund Keeley & Philip Sherrard trans., 1975), <https://www.poetryfoundation.org/poems/51294/waiting-for-the-barbarians>.

⁵²³ See *supra* Section II.B.1.

⁵²⁴ See *supra* notes 130–131 and accompanying text.

⁵²⁵ Cf. Thomas C. Berg, *Masterpiece Cakeshop: A Romer for Religious Objectors?*, 2017 CATO SUP. CT. REV. 139, 170 (2018).

⁵²⁶ See, e.g., Ronald G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* (Nat’l Bureau of Econ. Research, Working Paper No. 22399, Jan. 2018), <https://www.nber.org/papers/w22399> (finding no racial differences in officer-involved police shootings of civilians). *But see* Samantha Nelson, *Paper Finding No Racial Bias in Shootings by Police Criticized*, USA TODAY, (July 21, 2016, 10:31 AM), <https://www.usatoday.com/story/news/nation-now/2016/07/21/paper-finding-no-racial-bias-shootings-police-criticized/87301632/> (quoting PHILLIP ATIBA GOFF ET AL., THE SCIENCE OF JUSTICE: RACE, ARRESTS AND POLICE USE OF FORCE, CENTER FOR POLICING EQUITY (2016), http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf).

improve training and policies to prevent further avoidable police shootings.⁵²⁷ Republican President Ronald Reagan can zealously oppose Democratic Speaker of the House Tip O’Neill over national policy and legislation while giving a speech proudly honoring O’Neill for his service.⁵²⁸ You can say “tomato” and I can say “tomahto.”⁵²⁹

Opposing identities thus can coexist without avoidable conflict or contradiction. Such conflict is unavoidable only when an identity majority chooses prejudice of an opposing identity minority over coexistence.⁵³⁰ Although true, these statements admittedly can sound like powerless platitudes. The geographic perspective however can empower these truths by placing them within an individualized physical space and a contextual place, reducing the actual and metaphorical distance between us all.

As the traditional African American spiritual song *Going Home* explained,

Going home, going home . . . Work all done, care laid by, going to fear no . . . Lots of folk gathered there, all the friends I knew . . . Nothing’s lost, all’s gain. No more fear or pain. No more stumbling by the way. No more longing for the day. Going to roam no more.⁵³¹

⁵²⁷ See, e.g., Chuck Wexler, *Why We Need to Challenge Conventional Thinking on Police Use of Force*, in POLICE EXECUTIVE RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 4–5 (2016), <https://www.policeforum.org/assets/30%20guiding%20principles.pdf>.

⁵²⁸ President Ronald Reagan said:

But in addition to celebrating a country and a personal friendship, I wanted to come here tonight to join you in saluting Tip O’Neill, to salute him for the years of dedication and devotion to country.

. . . .

Tip, you are a true son of Boston College and our friend, and we salute you. You are also a leader of the Nation, and for that we honor you. But you also embody so much of what this Nation is all about, the hope that is America. So, you make us proud as well, my friend; you make us proud.

Ronald Reagan, U.S. President, Remarks at a Dinner Honoring Speaker of the House of Representatives Thomas P. O’Neill, Jr. (Mar. 17, 1986), <http://www.presidency.ucsb.edu/ws/?pid=37009>.

⁵²⁹ See George Gershwin & Ira Gershwin, *Let’s Call the Whole Thing Off*, in SHALL WE DANCE (RKO Radio Pictures 1937).

⁵³⁰ See, e.g., United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

⁵³¹ Czech composer Antonín Dvořák supposedly incorporated the melody of this old African American spiritual song into the largo of his “New World Symphony.” ANTONÍN DVOŘÁK, *Symphony No. 9 in E Minor*, in OP. 95, B. 178 (New World Symphony 1893). Dvořák composed the symphony while visiting the United States, and in 1893 allegedly said, “in the Negro melodies of America I discover all that is needed for a great and noble school of music.” Michael Beckerman, *The Real Value of Yellow Journalism: James Creelman and Antonín Dvořák*, 77 THE MUSICAL Q. 749, 749 (1993) (citation and internal quotation marks omitted).

The epic roaming hero can only truly come home by renouncing the fight to return home.⁵³² In *Waiting for the Barbarians*, the book inspired by Cavafy's poem,⁵³³ J.M. Coetzee's Magistrate experienced true peace and freedom only when he stopped othering the "Barbarians."⁵³⁴ Perhaps what Maya Angelou understood⁵³⁵ was what a commentator of Coetzee's work boldly declared, "the creation of a new, truly inclusive collectivity, a community that would not be dependent on the affirmation of identity or sameness but founded on a recognition of our infinite difference."⁵³⁶ If so, then as T.S. Eliot wrote, "And the end of all our exploring will be to arrive where we began and to know the place for the first time."⁵³⁷ "And when we find ourselves in the place just right, 'Twill be in the valley of love and delight."⁵³⁸

⁵³² For a discussion of the recurring motif of the hero's epic fight to return home, see *supra* note 79 and accompanying text.

⁵³³ See *supra* note 522 and accompanying text.

⁵³⁴ J.M. COETZEE, *WAITING FOR THE BARBARIANS* 90 (1980). For his abandonment of his former "home," the Magistrate faced treason charges and torture. See *id.*

⁵³⁵ See ANGELOU, *LETTER TO MY DAUGHTER*, *supra* note 519; Popova, *supra* note 520 and accompanying text.

⁵³⁶ Stef Craps, *J.M. Coetzee's Waiting for the Barbarians and the Ethics of Testimony*, 88 *ENG. STUD.* 59, 59 (2007). Accord BELL HOOKS, *YEARNING*, *supra* note 78, at 148.

⁵³⁷ See GLENN HUGHES, *A MORE BEAUTIFUL QUESTION: THE SPIRITUAL IN POETRY AND ART* 101 (Univ. of Missouri Press 2011) (quoting T.S. Eliot, *Little Gidding*, in *FOUR QUARTETS* (1942)).

⁵³⁸ JOSEPH BRACKETT, *SIMPLE GIFTS* (1848). American composer Aaron Copland adopted this traditional Shaker melody in his Pulitzer Prize-winning ballet score *Appalachian Spring*. AARON COPLAND, *APPALACHIAN SPRING* (1942). See Betsy Schwarm, *Appalachian Spring: Ballet by Copland*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/topic/Appalachian-Spring> (last visited Dec. 16, 2018). Copland later commented, "I gave voice to [the Appalachian] region without knowing I was giving voice to it." *Milestones of the Millennium: "Appalachian Spring" by Aaron Copland with Robert Kapilow and John Adams*, NPR, <https://www.npr.org/programs/specials/milestones/991027.motm.apspring.html> (last visited Nov. 11, 2018).

